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HANDBOOK  
OF THE LAW OF  
PRINCIPAL AND AGENT

By FRANCIS B. TIFFANY

AUTHOR OF DEATH BY WRONGFUL ACT, LAW OF SALES, ETC

SECOND EDITION

BY

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ST. PAUL, MINN.  
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## PREFACE TO SECOND EDITION

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IN THE preparation of the second edition, substantial changes in arrangement and content have been made. Approximately half of the text has been entirely rewritten, and the footnotes of the entire book have been revised. The changes in the text have been made in an effort to make the statements thereof more exact and comprehensive formulations of the law as it now is, and to present the material in an order which is better suited to pedagogic requirements. The cases cited in the footnotes have been re-examined, and those retained which are most valuable. To these have been added the important cases of the last twenty years, and citations to decisions, notes, and articles in law periodicals which will furnish guidance to students or practitioners desiring to investigate topics more thoroughly. To each case cited has been added the date of the decision. This the reviser believes desirable, because the significance of a case so often depends upon the date of its decision.

The reviser is deeply indebted to his associates, Professors Underhill Moore and Young B. Smith, for suggestions embodied in the new parts of the book dealing with the entrepreneur theory and the questions of scope. Any persons inclined to differ with these suggestions should blame the reviser, however, rather than those whose ideas may have been expressed imperfectly.

RICHARD R. B. POWELL.

NEW YORK CITY, May 19, 1924.

(v)

## PREFACE

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THE object of this book, as has been explained more fully in the introductory chapter, is to present the general rules and principles of that part of the law of Agency which may conveniently be classed under the head of Principal and Agent. Topics which are commonly classed under the head of Master and Servant have been largely excluded, or have been discussed only incidentally. The scope of the book has been thus limited both because it was the desire of the writer to treat the matters considered with greater fullness of illustration in text and notes than would have been possible had its scope been enlarged, and because the matters excluded have been covered by other books in the Hornbook Series.

The subject presents many difficult points as to which there is conflict of opinion, sometimes in respect to the rules, sometimes in respect to the reasons for the rules. It has been the aim to discuss these questions briefly and, when possible within the limited compass of an elementary book, to give expression to the views of the judges in leading cases; and on all points treated to cite, in addition to the leading cases, a sufficient number of the later cases to make the book serviceable to the practitioner as well as to the student.

The author desires to express his obligation to the many writers who have contributed to formulate and classify this branch of the law,—and particularly to Story, whose Commentaries are still indispensable to the student; to Prof. Floyd R. Mechem, whose great treatise deservedly ranks as a standard of authority; to Prof. Ernest W. Huffcut, whose recent book has done so much to clarify and illuminate the subject; to William Bowstead, Esquire, whose Digest of the Law of Agency admirably fulfills its object of reducing the English law to a concise statement of definite rules and principles; and to Prof. Eugene Wambaugh, whose full and discriminating Selection of Cases forms a basis for the study of Agency.

F. B. T.

St. PAUL, June 1, 1903.

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HANDBOOK  
ON THE  
**LAW OF AGENCY**  
SECOND EDITION

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**CHAPTER I**

**INTRODUCTORY**

1. Scope of Law Treated Herein.
2. Arrangement of Material.
3. General Characteristics of This Field of Law.

**SCOPE OF LAW TREATED HEREIN**

1. The law of principal and agent deals with the imposition upon one of legal consequences for an act done, in whole or in part, by another, excluding detailed treatment of the rules applied to artificial entities, such as partnerships and corporations, and treating briefly such imposition of responsibility in tort and crime.

In the evolution of social institutions, the transaction of business has become more and more complex. This has resulted in an increasing utilization of others in the execution of business enterprises. Law, as an instrument of social control, has found it useful, for various reasons, to impose upon persons who so utilize others, certain legal conse-

quences for acts done, in whole or in part, by such others.<sup>1</sup> Thus, if an individual engages in business and associates with himself various helpers, to divide the task and more efficiently carry on the business, the acts of these associates may impose liabilities or confer rights upon the individual heading the enterprise. So, also, if A., B., and C. form the relationship known as a partnership, the acts of A. may alter the rights and obligations of B. and C. If the group of associates have formed a corporation, the acts of the representatives of the corporation may increase or charge the assets of the corporation and even the assets of the individual stockholders therein.

The entire law governing the imposition of such legal consequences upon one for acts done wholly or in part by another would be too great a task for one short treatise. Hence the discussion covered by this book will be confined, for the most part, to the principles governing the imposition of legal consequences upon an *individual* for acts done, in whole or in part, by another *individual*. This will leave for treatment elsewhere the specialized rules governing partnerships, corporations and the participants in a Massachusetts Trust.<sup>2</sup> But even within the field thus limited, further restrictions are necessary.

In carrying on a business enterprise the persons hired generally fall into two groups: First, those whose tasks are primarily manual or mechanical, such as chauffeurs, truck drivers, workmen engaged in production; and, second, those whose tasks involve primarily the creation of new legal relations between the hirer and third persons, such as insurance agents, traveling salesmen, and men in executive positions.<sup>3</sup> In the pigeonholing process of text-

<sup>1</sup> Holmes, 4 Harv. Law Rev. 347; Baty, Vicarious Liability (1916) chapter 9.

<sup>2</sup> Gilmore, Partnership; Mechem, Elements of Partnership; Clark, Private Corporations; Morawetz, Private Corporations.

<sup>3</sup> Wright, Principal and Agent, 2; Huffcut, Agency (2d Ed.) 17;

book construction the rules governing the relations of hirer and the representatives of the first type have come to be called the "law of master and servant," while the body of rules governing the relations between the hirer and the second type are known as the "law of principal and agent."<sup>4</sup>

It is apparent that one individual may be both a "servant" and an "agent," using the words in this restricted sense.<sup>5</sup> Because of the large number of instances, however, in which an individual is clearly of one type rather than of the other, and because of widely different considerations of policy involved, the law in the two fields has developed along different lines. Our task will concern itself with the field of principal and agent thus defined, discussing only briefly the authority and power<sup>6</sup> of an agent to bind his

Dwight, Pers. & P. P. 323. Cal. Civil Code, § 2009, defines servant as one employed to render personal services to his employer, and section 2295 defines an agent as one who represents another in dealings with third persons. The difficulties into which courts are led by such definitions is well shown in *Sumner v. Nevin*, 4 Cal. App. 347, 87 Pac. 1105 (1906).

Cf. *Burkhalter v. Ford Motor Co.*, 29 Ga. App. 592, 116 S. E. 333 (1923).

\* "It is to be regretted that the word 'agency' should be used to cover the whole field of representation, and that the word 'agent' should at the same time be used as the name of the representative in one branch of it. If there were another word for agency (e. g., 'representation'), or another word for agent (e. g., 'deputy'), many tedious circumlocutions might be avoided. It might be better still if the whole field were called the 'Law of Representation,' while the branch known as the 'Law of Principal and Agent' were called the 'Law of Agency,' and that known as the 'Law of Master and Servant' were called the 'Law of Service.'" Huffcut, *Agency* (2d Ed.) 10, note 5; Clark and Skyles, *Agency*, § 5; Mecham, *Agency* (1914 Ed.) §§ 36 and 39.

<sup>5</sup> *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440 (1889); *Prowd v. Gore*, 57 Cal. App. 458, 207 Pac. 490 (1922).

<sup>6</sup> The authority of an agent should be carefully distinguished from the power of an agent. These expressions have been used with great carelessness. An act is within the authority of an agent if the agent is privileged to do that act by the principal; that is, if the agent's doing of the act is not a violation of the agent's duty to his principal. An act is within the power of an agent if the agent has the legal ability to bind the principal to a third person thereby, even

hirer otherwise than by contract. Another and more accurate way of stating the limitations upon the field covered by this book is to say that we shall discuss rather completely the authority and power of a representative to bind his constituent in contract and briefly the authority and power of a representative to bind his constituent in tort. The important distinction between the two fields lies in the type of liability sought to be imposed and not in the name affixed to either the hirer or the hired.<sup>7</sup>

### ARRANGEMENT OF MATERIAL

#### 2. The subject-matter has been arranged according to the principles or policies involved.

In our field there are three generalized characters, the principal, the agent, and the third person. Frequently it will be convenient to refer to them as P., A., and T., respectively. It can readily be seen that rights and liabilities may exist between the principal and the third person, or between the principal and the agent, or between the agent and the third person. In some text-books, therefore, the subject has been divided into three parts, corresponding to these sets of rights and liabilities. But many principles and policies determine and influence more than one set of rights and liabilities. For instance, the concept "scope of authority" determines rights and liabilities in all three sets. Thus T. acquires rights against P., if A.'s act was within his scope;<sup>8</sup> A. is entitled to remuneration from P., if his act was within his scope;<sup>9</sup> and T. is entitled to

though the act constitutes a violation of the agent's duty to the principal. For further amplification of this distinction, see *infra*, sections 16, 34, 84, and 86.

<sup>7</sup> MERRITT v. HUBER, 137 Iowa, 135, 114 N. W. 627, Powell, Cas. Agency, 293 (1908).

<sup>8</sup> Hadley Milling Co. v. Kelley, 117 Ark. 173, 174 S. W. 227 (1915). See, also, chapters II to VI, inclusive.

<sup>9</sup> See chapter XVI.

recover damages from A., if A.'s act was not within his scope.<sup>10</sup> Because of the very evident artificiality of the threefold division, an effort has been made to treat the subject according to the principles or policies involved, rather than according to the parties whose claims are under consideration. Thus chapters II to VII seek to clarify the different significances of "scope"; chapters VIII to XII, inclusive, treat subjects affecting more than one of the three sets of rights and liabilities; and the last four chapters deal with those more localized principles, which control in only one of the three relations.

### GENERAL CHARACTERISTICS OF THIS FIELD OF LAW

3. The law of principal and agent is modern in origin, provides the background for the law of partnerships and corporations, is instructive as to the close interrelation of business and law, and presents a fertile field for constructive work.

The law of principal and agent is relatively modern in origin, and hence its study need not concern itself with a mass of historical material, so necessary to the understanding of many other branches of law. This enables the student to concentrate his energy upon the more recent decisions in the field. Despite these facts, its principles form the background and much of the substance of the modern law of partnerships and corporations. It was but natural that, as the forms of business organization became more complex, the rules developed governing the imposition of legal consequences upon one individual for acts done in whole or in part by another individual should have been extended to the newer and more complex business entities. Thus a knowledge of the law in this field is of great assist-

<sup>10</sup> See sections 129 and 130, *infra*.

ance, if not prerequisite, to an understanding of the laws of partnerships and corporations. In no other field of law is the close interrelation of business practice and the rules of law more apparent. Thus study of the law of principal and agent enables one to grasp the true goal of all law, namely, the facilitation of transactions between the units of society. Lastly, our study concerns a branch of law which is now in the throes of active evolution. This means that this law is plastic, and a practitioner may well hope to discover herein the processes by which law is evolved and to contribute a significant bit to that evolution.

## CHAPTER II

### AUTHORITY OF AN AGENT TO BIND HIS PRINCIPAL IN CONTRACT

4. Purpose of the Law of Agency.  
Appointment—
  5. By Contract.
  6. By Entering upon Gratuitous Service.  
Formalities—
    7. General Rule.
    8. To Execute Sealed Instrument.
    9. By Corporation.
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Construction—
    11. Power of Attorney.  
Informal Express Authority—
      12. General Rule.
      13. Ambiguity.
      14. Incidental Powers Implied.
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### PURPOSE OF THE LAW OF AGENCY

4. The principles of the law of agency have been guided in their development by a desire to facilitate the transaction of business.

Before entering upon an analysis of the concept "scope of authority" to bind P. to T. in contract, we must consider how the relation of principal and agent is created; that is, the origin of the agent's authority. Speaking generally, such authority must rest upon the act or conduct of P. in appointing A.<sup>1</sup> Sometimes the same legal conse-

<sup>1</sup> "Agency is founded upon a contract, either express or implied, by which one of the parties confides to the other the management of some business, to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it." 2 Kent, Comm. 612, Mecham, Agency, (1914 Ed.) § 1; Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 S. E. 845, Ann. Cas. 1912B, 148 (1910); Plummer v. Knight, 156 Mo. App. 321, at

quences result from P.'s conduct subsequent to A.'s action; that is, by ratification; but ratification never creates authority. The extent to which ratification has the same legal results as prior authority is considered elsewhere.<sup>2</sup> It is also true that P. may become obligated to T. through conduct of A. not actually authorized by P. This power of A., as distinguished from the authority of A., is also discussed hereafter.<sup>3</sup> The problem to the solution of which this chapter is addressed is this: What is the scope of an agent's authority, in so far as it depends upon P.'s appointment of another to act as his agent?

Some writers have sought to find a general principle underlying the entire law of agency,<sup>4</sup> to discover a guiding star to be relied on in construction of language used or of conduct which has occurred. Some of these writers have embraced the fiction of identification, i. e., that principal and agent are one; some have delighted themselves in the veil of Latinity, "Qui facit per alium facit per se;" and a few, having regard to the historical concurrence between the development of the law of agency and the expansion of the size of business enterprises, have believed that the whole and sufficient basis of this law is the desire to facilitate the transaction of business.<sup>5</sup> This the writer believes must be the final arbiter of any doubtful question in the field, rather than the utilization of any fiction or the supposed application of any maxim to facts not thought of by those who framed it.

page 335, 137 S. W. 1019 (1911); *Allen v. San Francisco Wholesale Exchange*, 59 Cal. App. 93, 210 Pac. 41 (1922).

<sup>2</sup> See sections 59-64, *infra*.

<sup>3</sup> See sections 16-19, *infra*.

<sup>4</sup> Holmes, 4 Harv. Law Rev. 345; Wigmore, 7 Harv. Law Rev. 315, 383, 441; 2 Pollock & Maitland, History of English Law, 530. Chief Justice Shaw suggested that its basis was the duty to so use one's own as not to injure another, in *Farwell v. Railroad Corp.*, 45 Mass. (4 Metc.) 49, 38 Am. Dec. 339 (1842). See Smith, 23 Col. Law Rev. 444, at page 452 ff.; Hackett, 7 Harv. Law Rev. 107.

<sup>5</sup> Abbott, 9 Harv. Law Rev. 507.

**APPOINTMENT—BY CONTRACT**

5. The appointment of an agent may be express or implied,  
It may be effected:

- (1) By a contract of employment, or
- (2) By request of the principal for performance of an act  
followed by the entrance of the agent upon its per-  
formance.

The agreement which forms the basis of the relation between principal and agent is commonly called a contract of agency.<sup>6</sup> It must be borne in mind, however, that the legal consequences of the relation are twofold. In the first place, P. does or may become subject to obligations to T. In the second place, as between P. and A., legal relations are created,<sup>7</sup> such as the duty on the part of the principal to compensate and indemnify the agent, and the duty on the part of the agent to obey instructions, to exercise due care, and to account. So far as concerns the liability of P. to T., it is wholly immaterial whether the agreement between P. and A. has the character of a contract or falls short of a contract. It is not even necessary, indeed, that the agent have capacity to contract.<sup>8</sup> The principal is bound by the act of the agent simply because he has authorized it. On the other hand, the mutual obligations of principal and agent rest largely, if not wholly, upon contract, express or implied. Thus, though a principal may be bound by the

<sup>6</sup> "An agency is created—authority is actually conferred—very much as a contract is made; i. e., by an agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression in words or conduct between them." Taft, J., in *Central Trust Co. v. Bridges*, 57 Fed. 753, at page 764, 6 C. C. A. 539 (1893).

<sup>7</sup> See sections 149–156, *infra*, and sections 142–147, *infra*.

<sup>8</sup> See sections 73–75, *infra*.

act of an agent who is devoid of contractual capacity, he could not, because of the absence of a valid contract, maintain an action against the agent for failure to obey instructions.

The appointment of an agent may be effected by a contract whereby a principal promises to employ and compensate the agent and the agent promises to act as such, or it may be effected by the mere request or permission of the principal, followed by the agent's entrance upon performance of the act requested. In the first case, the relation of principal and agent is at once created. The principal may, indeed, before performance by the agent, revoke the authority and terminate the relation,<sup>9</sup> or the agent might terminate it by renouncing the authority,<sup>10</sup> subject in either case to the right of the other to recover damages for breach of contract of employment; but until revocation or renunciation any act of the agent within the scope of agency is binding upon the principal and the mutual obligations of principal and agent subsist. The agreement, to be a contract and mutually binding, must, of course, be founded upon consideration, although without consideration it would still be operative as a request. In the second case, where no contract is entered into in advance, but the agent acts in pursuance of request or permission, the relation of principal and agent does not arise until the agent has entered upon performance. The request may take the form of an offer to compensate the agent if he will perform an act,<sup>11</sup> or it may be a simple request without offer of compensation, but from which the law, if there are no circumstances to negative the implication, will imply an offer of reasonable compensation.<sup>12</sup> In either case, if the agent en-

<sup>9</sup> See section 86, *infra*, and also sections 151 and 152, *infra*.

<sup>10</sup> See section 86, *infra*, and also section 154, *infra*.

<sup>11</sup> Roberts v. Ogilby, 9 Price, 269, 147 Rep. 89 (1821).

<sup>12</sup> Van Arman v. Byington, 38 Ill. 443 (1865); as to what constitutes sufficient facts to negative the implication, Hertzog v. Hertzog, 29 Pa. 465 (1857); Hall v. Finch, 29 Wis. 278, 9 Am. Rep. 559 (1871).

ters upon performance of an act, he thereby signifies his acceptance of the offer, and, if he be competent to contract, a contract of agency is formed; but, whether he be competent or not, the act performed is binding upon the principal.

#### APPOINTMENT—BY ENTERING UPON GRATUITOUS SERVICE

##### 6. As to gratuitous agency, a distinction is made between nonfeasance and misfeasance.

An executory agreement of employment, which contemplates gratuitous services upon the part of the agent, is without consideration and nudum pactum.<sup>13</sup> No obligation arises up to the moment it is acted upon.<sup>14</sup> Of course, consideration for the agent's promise is material only so far as it affects the mutual obligations of principal and agent, since want of consideration cannot affect the liability of the principal towards the third person for acts which he has authorized. Once acted upon, the authority to that extent is irrevocable, and the act performed is binding upon the principal. The rule is accordingly laid down that a gratuitous agent is not liable for nonfeasance, but is liable

<sup>13</sup> THORNE v. DEAS, 4 Johns. 84, Powell, Cas. Agency, 1 (N. Y. 1809); Wilkinson v. Coverdale, 1 Esp. 75 (1793); Condon v. Exton-Hall Agency, 80 Misc. Rep. 369, 142 N. Y. Supp. 548 (1913); and comment thereon, 27 Harv. Law Rev. 167.

In the case of Siegel v. Spear & Co., 234 N. Y. 479, 138 N. E. 414, 26 A. L. R. 1208 (1923), the New York Court of Appeals held the gratuitous agent liable to the principal because the court found that the agent had entered upon the performance of the task. By way of dictum the court intimated that the facts of Thorne v. Deas might now be held to show consideration, namely, that the plaintiff principal, in refraining from insuring through his own agent at the suggestion of the defendant gratuitous agent, had surrendered a right, which furnished a consideration for defendant's promise to procure the insurance.

<sup>14</sup> Anson, Contr. 333; Balf v. West, 13 C. B. 466, 138 Rep. 1281 (1853).

for misfeasance; in other words, that until he has entered upon the work he is under no obligation, but that if he has entered upon it, and thereby has affected the position of his employer, he becomes liable for negligence in performance.<sup>15</sup> Thus one who has gratuitously undertaken to procure insurance for another incurs no liability by failure to insure, but if he proceeds to carry his undertaking into effect by getting a policy, and does it so negligently that the other cannot recover upon the policy, he is liable to an action.<sup>16</sup> How far the measure of skill and care which the gratuitous agent who enters upon performance owes to his principal is affected by the fact that the agency is gratuitous will be considered later.<sup>17</sup>

#### APPOINTMENT—FORMALITIES—GENERAL RULE

7. Unless otherwise provided by statute, authority for any purpose except the execution of an instrument under seal may be conferred upon an agent by deed, by writing, by word of mouth, or by conduct.

Ordinarily no particular form is essential to the appointment of an agent.<sup>18</sup> The consent or authorization of the principal may be express or implied. It may be expressed in the form of a writing under seal or power of attorney, or of an informal written instrument, as by letter of instructions, or in the form of a mere oral request, or it may

<sup>15</sup> Wilkinson v. Coverdale, 1 Esp. 75 (1793); Williams v. Higgins, 30 Md. 404 (1869); Spencer v. Towles, 18 Mich. 9 (1869); Isham v. Post, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766 (1894); Carr v. Maine Central R. R., 78 N. H. 502, 102 Atl. 532, L. R. A. 1918E, 389 (1917); and comment thereon, 31 Harv. Law Rev. 891.

<sup>16</sup> THORNE v. DEAS, 4 Johns. 84, Powell, Cas. Agency, 1 (N. Y. 1809).

<sup>17</sup> See section 145, *infra*.

<sup>18</sup> Story, Ag. § 45 ff.; Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160 (1814).

be implied from conduct.<sup>19</sup> Authority may be conferred by parol not only to make ordinary simple contracts<sup>20</sup> but to execute bills of exchange and promissory notes,<sup>21</sup> and contracts for the sale of real estate.<sup>22</sup> So, too, the agent's consent or acceptance of the authority may be express or it may be implied from his acting thereunder.

All contracts at common law were classified as either specialties or parol contracts, and there was not recognized any third class, such as contracts in writing.<sup>23</sup> All contracts merely written, and not specialties, were parol contracts, and authority to execute them, as we have seen, might be conferred without writing. Statutes, indeed, often require particular classes of contracts to be in writing; but, even where this is the case, unless the statute expressly or by implication provides otherwise, authority to execute such contracts may generally, as at common law, be conferred by word of mouth.<sup>24</sup> The provisions in the stat-

<sup>19</sup> See section 10, *infra*.

<sup>20</sup> *Emerson v. Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66 (1815); *Shaw v. Nudd*, 25 Mass. (8 Pick.) 9 (1829); *Kirklin v. Association*, 107 Ga. 313, at page 318, 33 S. E. 83 (1899).

"At common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it. Nevertheless there may be cases where the statute requires a personal signature. The common-law rule, 'Qui facit per alium facit per se,' will not be restricted, except where a statute renders a personal signature necessary." *Blackburn, J.*, in *Reg. v. Justices of Kent*, L. R. 8 Q. B. 305 (1873).

<sup>21</sup> *Anon.*, 12 Mod. 564, 88 Rep. 1522 (1701); *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160 (1814); *Taylor v. Johnson*, 18 Ga. App. 161, 89 S. E. 77 (1916); *Forest Hill Ass'n v. Fisher*, 140 Md. 666, 118 Atl. 164 (1922).

<sup>22</sup> *McWhorter v. McMahan*, 10 Paige, 386 (N. Y. 1843); *Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257 (1853); *Johnson v. Dodge*, 17 Ill. 433 (1856); *Baum v. Dubois*, 43 Pa. 260 (1862); *Heard v. Pilley*, 4 Ch. App. 548 (1869); *Long v. Hartwell*, 34 N. J. Law, 116 (1870); *Brown v. Eaton*, 21 Minn. 409 (1875); *KEIM v. O'REILLY*, 54 N. J. Eq. 418, 34 Atl. 1073, *Powell Cas. Agency*, 3 (1896).

See *N. Y. Real Property Law*, § 259.

<sup>23</sup> *Rann v. Hughes*, 7 T. R. 350, note, 101 Rep. 1014, note (about 1770).

<sup>24</sup> *Tibbett v. West & South Towns St. R. R. Co.*, 153 Ill. 147, 38 N. E. 664 (1894).

ute of frauds<sup>25</sup> in respect to the authority of agents to execute the writings thereby required are of two sorts. Under the first and third sections, which relate to the creation, transfer, and surrender of estates or interests in land, the writings required, if executed by agents, must be signed by "agents thereunto lawfully authorized by writing."<sup>26</sup>

In the United States, as well as in England to-day,<sup>27</sup> the creation, assignment, and surrender of estates or interests in land, with the one exception of leases for a term not exceeding one year, are by statute required to be by deed, and it is therefore necessary that agents should be appointed under seal.<sup>28</sup> On the other hand, under the fourth section of the statute of frauds, which relates to special promises of executors and administrators to answer out of their own estate, special promises to answer for the debt, default, or miscarriage of others, agreements made upon consideration of marriage, contracts or sales of lands and interests in land, and agreements not to be performed within one year, and which requires the agreement, or some memorandum or note thereof, to be in writing, the writing may be signed by the party to be charged, "or by some other person thereunto by him lawfully authorized." So, too, under the seventeenth section, relating to contracts for the sale of goods, wares, and merchandise for the price of £10 or over, the note or memorandum, which is one of the means by which the statute may be satisfied, may be signed by an agent "thereunto lawfully authorized." Under the fourth

<sup>25</sup> 29 Car. II, c. 3.

<sup>26</sup> Where the statute requires that the agent must be authorized in writing, it has been held—it would seem erroneously—that the statute is not satisfied by a signature by another in the presence of the principal at his verbal request. *Wallace v. McCullough*, 1 Rich. Eq. 426 (S. C. 1845); *Billington v. Com.*, 79 Ky. 400 (1881); *Dickson's Ad'm v. Luman*, 93 Ky. 614, 20 S. W. 1038 (1893); *Bramel v. Byron*, 43 S. W. 695 (Ky. 1897). But the weight of authority appears to be opposed to this view. See cases in footnote 33, p. 16, *infra*.

<sup>27</sup> 8 & 9 Vict. 106.

<sup>28</sup> See section 8, *infra*.

and seventeenth sections, in England and in America, in those states where the substance of these sections has been re-enacted, it is held that the manner in which the agent may be "lawfully authorized" is left to the rules of the common law, and hence that the agent need not be authorized by writing.<sup>29</sup> In some states, however, and especially with reference to contracts for the sale of land, it is enacted that the authority must be in writing.<sup>30</sup> It is to be observed that contracts for the employment of agents, if by the terms of the contract the employment is to continue for more than one year, or if performance within the year is impossible, are governed by the fourth section of the statute of frauds, and the agreement, or some memorandum or note thereof, must be in writing.<sup>31</sup>

#### APPOINTMENT—FORMALITIES—TO EXECUTE SEALED INSTRUMENT

8. Authority to execute an instrument under seal must be conferred by instrument under seal, except where the deed is executed by the agent in the presence of the principal at his request.

<sup>29</sup> Emmerson v. Heelis, 2 Taunt. 38, 127 Rep. 989 (1809); Hawkins v. Chace, 36 Mass. (19 Pick.) 502, at page 505 (1837); Roehl v. Hau-messer, 114 Ind. 311, 15 N. E. 345 (1887).

<sup>30</sup> Chappell v. McKnight, 108 Ill. 570 (1884); Hall v. Wallace, 88 Cal. 434, 26 Pac. 360 (1891); section 2783, Mo. Rev. St. 1909; Be-heret v. Myers, 240 Mo. 58, at page 84, 144 S. W. 824 (1911); Crumley v. Shelton, 71 Colo. 466, 208 Pac. 460 (1922).

So, also, by statute in Kentucky and South Dakota as to negotiable instruments. Finley v. Smith, 165 Ky. 445, 177 S. W. 262, L. R. A. 1915F, 777 (1915); First Nat. Bank v. Montgomery, 196 N. W. 95 (S. D. 1923).

Where the owner authorizes an agent in writing to sell land, and he made a sale on terms more favorable to the purchaser, and the owner orally agreed to the change, the contract of sale was held not enforceable, since the agent was not authorized in writing to make it. KOZEL v. DEARLOVE, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416, Powell, Cas. Agency, 149 (1892).

<sup>31</sup> Bracegirdle v. Heald, 1 B. & Ald. 722, 106 Rep. 266 (1818); Snell-

It is an ancient doctrine of the common law that authority to execute an instrument under seal must be evidenced by an instrument of equal solemnity. Hence authority to execute a deed or like instrument must be conferred by power under seal.<sup>32</sup> This rule, however, does not apply to an instrument executed by another in the presence of the principal at his request.<sup>33</sup> Thus, where the grantor's daughter offered to sign a deed for her mother, who assented with a nod, and her daughter signed her mother's name, "P. G., by M. C. G.", it was held that the deed was well executed. Shaw, C. J., said: "The name, being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind which are the essential and efficient ingredients of

ing v. Huntingfield, 1 C. M. & R. 20, 149 Rep. 976 (1834); Williams v. Bemis, 108 Mass. 91, 11 Am. Rep. 318 (1871); Shotwell v. Physicians' Stationery Co., 220 Mich. 695, 190 N. W. 692 (1922).

If, however, the agreement be for the performance of services until the happening of an event which may happen within the year, it does not come within the provisions of the statute of frauds. Roberts v. Rockbottom Co., 48 Mass. (7 Metc.) 46 (1843); Updike v. Ten Broeck, 32 N. J. Law, 105, at page 113 ff. (1866); Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502 (1875); East Tennessee, V. & G. R. Co. v. Staub, 75 Tenn. (7 Lea) 397 (1881).

<sup>32</sup> Banorgee v. Hovey, 5 Mass. 11, 4 Am. Dec. 17 (1809); Gordon v. Bulkeley, 14 Serg. & R. 331 (Pa. 1826); Blood v. Goodrich, 9 Wend. 68, 24 Am. Dec. 121 (N. Y. 1832); Paine v. Tucker, 21 Me. 138, 38 Am. Dec. 255 (1842); Perry v. Smith, 29 N. J. Law, 74 (1860); Peabody v. Hoard, 46 Ill. 242 (1867); OVERMAN v. ATKINSON, 102 Ga. 750, 29 S. E. 758; Powell, Cas. Agency, 7 (1897); Peterson v. City of New York, 194 N. Y. 437, 87 N. E. 772 (1909).

<sup>33</sup> Ball v. Dunsterville, 4 T. R. 313, 100 Rep. 1038 (1791); Hudson v. Revett, 5 Bing. 368, 130 Rep. 1103 (1829); King v. Longnor, 4 B. & Ald. 647, 110 Rep. 599 (1833); GARDNER v. GARDNER, 59 Mass. (5 Cush.) 483, 52 Am. Dec. 740; Powell, Cas. Agency, 8 (1850); Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84 (1863); McMurtry v. Brown, 6 Neb. 368 (1877); Mutual Benefit Life Ins. Co. v. Brown, 30 N. J. Eq. 193 (1878); Croy v. Fusenbark, 72 Ind. 48 (1880).

Where the name of the grantor in a deed was signed by the grantee at the grantor's request and in his presence, and he acknowledged the deed and delivered it, he hereby adopted the signature and made the deed valid. Clough v. Clough, 73 Me. 487, 40 Am. Rep. 386 (1882).

the deed, are hers, and she merely uses the hand of another through incapacity, or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a deed by attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his act, and therefore the power is to be strictly examined and construed, and the instrument conferring it is to be proved by evidence of as high a nature as the deed itself.”<sup>34</sup> It does not necessarily follow that a sealed instrument executed by an agent whose authority is not under seal is without effect. If a contract need not be by specialty, it will be valid as a simple contract, notwithstanding the attaching of a seal.<sup>35</sup> So a conveyance executed by an agent authorized only by parol may have effect in equity as a contract to convey, and support a suit for specific performance.<sup>36</sup>

<sup>34</sup> GARDNER v. GARDNER, 59 Mass. (5 Cush.) 483, 52 Am. Dec. 740, Powell, Cas. Agency, 8 (1850).

<sup>35</sup> Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330 (1851); Long v. Hartwell, 34 N. J. Law, 116 (1870); Wagoner v. Watts, 44 N. J. Law, 126 (1882); Marshall v. Rugg, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679 (1896); Nichols v. Haines, 98 Fed. 692, 39 C. C. A. 235 (1900); Wood v. Wise, 153 App. Div. 223, 137 N. Y. Supp. 1017 (1912), Affirmed 208 N. Y. 586, 102 N. E. 1117 (1913). Contra: Wheeler v. Nevins, 34 Me. 54 (1852); Baker v. Freeman, 35 Me. 485 (1853); Hayes v. Atlanta, 1 Ga. App. 25, 57 S. E. 1087 (1907); Dalton Buggy Co. v. Wood, Son & Bro., 7 Ga. App. 477, 67 S. E. 121 (1910); Neely & Co. v. Stevens, 138 Ga. 305, 75 S. E. 159 (1912).

<sup>36</sup> Morrow v. Higgins, 29 Ala. 448 (1856); Groff v. Ramsey, 19 Minn. 44 (Gil. 24) (1872); Jones v. Marks, 47 Cal. 242 (1874); Watson v. Sherman, 84 Ill. 263 (1876); Hersey v. Lambert, 50 Minn. 373, 52 N. W. 963 (1892).

Where the defendant executed a deed, leaving blanks for the name of the grantee and the price, and gave it to an agent, with instructions, when he had sold the land, to fill up the blanks and deliver to the purchaser, which the agent did, held that, although the instrument was inoperative as a deed, because incomplete when signed and sealed, it could be enforced by the purchaser by way of specific performance as a contract of sale; it having been in legal effect signed by defendant in his name by his lawfully authorized agent and the statute of frauds being thus satisfied. Blacknall v. Parrish, 59 N. C. 70, 78 Am. Dec. 239 (1860).

It follows logically, from the rule that authority to execute an instrument must be of as high a nature as the instrument executed, that authority to fill blanks in an instrument under seal must be conferred by power under seal. A deed or bond, it is urged, although otherwise executed, if incomplete by reason of omission of a material part, such as the name of the grantee or obligee, or the description of the premises conveyed, is a nullity, and cannot become operative until the omitted part has been inserted and the instrument afterwards duly delivered, and it is accordingly held by those courts which have jealously maintained the sanctity of a seal that authority thus to complete a sealed instrument cannot be conferred by parol.<sup>37</sup> The part filled in must, of course, be material, since, if immaterial, the instrument is in effect wholly complete, and an immaterial alteration of an instrument, not being fraudulent, does not invalidate it.<sup>38</sup> The strictness of the rule has, however, been mitigated by invoking the principle of estoppel, even by courts which might not be disposed to concede that authority to fill blanks may be conferred by parol. Thus it has been held that, when a grantor signs and seals a deed, leaving unfilled blanks, and gives it to an agent, with authority to fill the blanks and deliver it, if the agent fills the blanks as authorized and delivers it to an innocent grantee without knowledge, the grantor is estopped to deny that the deed as delivered was his deed.<sup>39</sup> From this position it is an easy step to that of holding

<sup>37</sup> U. S. v. Nelson, 2 Brock. 64, Fed. Cas. 15,862 (1822); Davenport v. Sleight, 19 N. C. 381, 31 Am. Dec. 420 (1837); Hibblewhite v. McMorine, 6 M. & W. 200, 151 Rep. 380 (1840); Graham v. Holt, 25 N. C. 300, 40 Am. Dec. 408 (1843); State v. Boring, 15 Ohio, 507 (1846); Ingram v. Little, 14 Ga. 173, 58 Am. Dec. 549 (1853); Burns v. Lynde, 88 Mass. (6 Allen) 305 (1863); Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266 (1871); Preston v. Hull, 64 Va. (23 Grat.) 600, 14 Am. Rep. 153 (1873); Adamson v. Hartman, 40 Ark. 58 (1882).

<sup>38</sup> Vose v. Dolan, 108 Mass. 155, 11 Am. Rep. 331 (1871).

<sup>39</sup> Phelps v. Sullivan, 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442 (1885).

that the principal is estopped, although the agent fills in the blanks otherwise than as authorized, if he delivers to an innocent grantee or obligee without notice, from the face of the instrument or otherwise, of the breach of orders.<sup>40</sup> Many courts, however, have so far recognized an exception to the rule requiring an authority to execute sealed instruments to be under seal as to declare that parol authority is sufficient to authorize the filling of a blank.<sup>41</sup>

<sup>40</sup> *White v. Duggan*, 140 Mass. 18, 2 N. E. 110, 54 Am. Rep. 437 (1885). It is to be noticed that another judge in the same week in *Phelps v. Sullivan*, 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442 (1885) said, "whether, if the agent violates the instructions in filling blanks the grantor would not in like manner be bound, we do not discuss." Cf. *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366 (1916); and see *Contra, Guthrie v. Field*, 85 Kan. 58, 116 Pac. 217, 37 L. R. A. (N. S.) 326 (1911); and comment thereon in 25 Harv. Law Rev. 184.

<sup>41</sup> *Wiley v. Moor*, 17 Serg. & R. 438, 17 Am. Dec. 696 (Pa. 1828); *Bridgeport Bank v. Railroad Co.*, 30 Conn. 231, at page 274 (1861); *Inhabitants of South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535 (1865); *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486 (1871); *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435 (1873); *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470 (1877); *State v. Young*, 23 Minn. 551 (1877); *Garland v. Wells*, 15 Neb. 298, 18 N. W. 132 (1883); *Cribben v. Deal*, 21 Or. 211, 27 Pac. 1046, 28 Am. St. Rep. 746 (1891); *Palacios v. Brasher*, 18 Colo. 593, 34 Pac. 251, 36 Am. St. Rep. 305 (1893); *Exchange Nat. Bank v. Fleming*, 63 Kan. 139, 65 Pac. 213 (1901); *Halliwill v. Weible*, 64 Colo. 295, 171 Pac. 372 (1918).

"Although it was at one time doubted whether parol authority was adequate to authorize an alteration or condition to a sealed instrument, the better opinion at this day is that the power is sufficient." *Drury v. Foster*, 2 Wall. 24, 17 L. Ed. 780, per Nelson, J. (U. S. 1864). In *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. Ed. 90 (1883), Field, J., after quoting with approval the above dictum, observed: "But there are two conditions essential to make a deed thus executed in blank operate as a conveyance. \* \* \* The blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." In *Drury v. Foster*, supra, a married woman executed and acknowledged a mortgage on her land, with the name of the mortgagee and the amount in blank, and intrusted it to her husband to secure a loan for a few hundred dollars. He borrowed \$12,800 of plaintiff, filling in his name and the amount; plaintiff being ignorant that the items were inserted before execution, and the wife being ignorant of the amount borrowed and receiving no benefit. It was held, in an action to foreclose, that these facts furnished her a defense. "By

Thus in a Minnesota case<sup>42</sup> Mitchell, J., said: "Whatever may formerly have been the rule, \* \* \* we think the better opinion, both on principle and authority, is that parol authority is adequate and sufficient to authorize an addition to or alteration of even a sealed instrument. At the present day the distinction between sealed and unsealed instruments is arbitrary, meaningless, and unsubstantiated by reason. The courts have for nearly a century been gradually doing away with the former distinctions between these two classes of instruments, and, if they have not yet wholly disappeared, it simply proves the difficulty of disturbing a rule established by long usage, even if the reason for the rule has wholly ceased to exist. We therefore hold that parol authority is sufficient to authorize the filling of a blank in a sealed instrument, and that such authority may be given in any way in which it might be given in the case of an unsealed instrument." It was also held that the authority might be implied as well as express. Under this view it can make no difference whether the grantee or obligee knows that the blanks have been filled by the hand of the agent or not, provided they have been

the laws of Minnesota," said the court, "an acknowledgment of the execution of a deed before the proper officers, privately and apart from her husband, by a feme covert, is an essential prerequisite to the conveyance of her real estate. \* \* \* And she is disabled from executing or acknowledging a deed by procuration, as she cannot make a power of attorney. \* \* \* We agree if she was competent to convey her real estate by signing and acknowledging the deed in blank, and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance, that its validity could not well be controverted. \* \* \* But there are two insuperable objections to this view in the present case: First, Mrs. Foster was disabled in law from delegating a person, either in writing or parol, to fill up the blanks and deliver the mortgage; and, second, there could be no acknowledgment of the deed, within the requisitions of the statute, until the blanks were filled and the instrument complete. Till then there was no deed to be acknowledged. The act of the feme covert and of the officers were nullities." See Nelson v. McDonald, 80 Wis. 605, 50 N. W. 893, 27 Am. St. Rep. 71 (1891).

<sup>42</sup> State v. Young, 23 Minn. 551 (1877).

filled in accordance with the authority conferred; nor will the principal be heard to assert, as against an innocent grantee without notice, that the instrument has been completed by the hand of the agent, and that the agent in so doing has violated his instructions,<sup>43</sup> provided the agent's act has been within either his authority or power.<sup>44</sup>

#### APPOINTMENT—FORMALITIES—BY CORPORATION

9. Jurisdictions differ as to the formalities necessary for the appointment of an agent by a corporation. The weight of authority holds that such agent may be appointed by parol.

It was formerly declared to be a rule, though not without exceptions, that a corporation can act only under its common seal,<sup>45</sup> and hence that the appointment of an agent to act for a corporation must be by instrument under the corporate seal. In England a distinction has become established between trading and nontrading corporations, and the rule at the present day appears to be that the appointment of an agent by a nontrading corporation must be under the common seal, except in cases where the application of the rule would cause very great inconvenience, or tend to defeat the very object for which the corporation was created,<sup>46</sup> but that a trading corporation may appoint an agent by parol for any purpose within the scope of the objects of its incorporation.<sup>47</sup> In the United States the early

<sup>43</sup> Butler v. United States, 21 Wall. 272, 22 L. Ed. 614 (U. S. 1874); Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470 (1877); Nelson v. McDonald, 80 Wis. 605, 50 N. W. 893, 27 Am. St. Rep. 71 (1891).

<sup>44</sup> See sections 16–18, *infra*.

<sup>45</sup> East London Water W. Co. v. Bailey, 4 Bing. 283, 130 Rep. 776 (1827); 1 Black. Com. 475; Story, *Agency*, §§ 52, 53.

<sup>46</sup> Church v. Imperial G. L. Co., 6 Ad. & E. 846, 112 Rep. 324 (1838); Mayor of Ludlow v. Charlton, 6 Mees. & W. 815, 151 Rep. 642 (1840); Lawford v. Billericay Rural Council, [1903] 1 K. B. 772.

<sup>47</sup> Henderson v. Australian Steam Nav. Co., 5 El. & Bl. 409, 119 Rep.

rule has been entirely repudiated, and it is held that a corporation may contract<sup>48</sup> and may confer authority upon agents for the performance of any act within the scope of its corporate powers in the same manner as an individual may do, and that the use of the corporate seal is not necessary unless the contrary be expressly provided by its charter or by some statute.<sup>49</sup> Nor is it necessary that an appointment to execute a corporate deed be under seal. Authority to authorize the conveyance of the company's property is usually vested in the board of directors or other governing body, and may be conferred by mere vote or resolution of the board.<sup>50</sup>

#### APPOINTMENT—IMPLIED

10. An appointment of an agent may be based upon an implication or logical inference from the words or conduct of the principal.

The appointment of an agent and the scope of his authority may be established by conduct as well as by words of

533 (1855); *South of Ireland Colliery Co. v. Waddle*, L. R. 4 C. P. 617 (1869); *Bowstead*, Ag. (1919 Ed.) § 23.

<sup>48</sup> *Bank of Columbia v. Patterson*, 7 Cranch, 299, 3 L. Ed. 351 (U. S. 1813); *Bank of U. S. v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552 (U. S. 1827); *Aerial League of America v. Aircraft Corp.*, 117 Atl. 704 (N. J. Err. & App. 1922).

<sup>49</sup> *Bank of U. S. v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552 (U. S. 1827); *Warren v. Insurance Co.*, 16 Me. 439, 33 Am. Dec. 674 (1840); *City of Detroit v. Jackson*, 1 Doug. 106 (Mich. 1843); *Ross v. City of Madison*, 1 Ind. 281, 48 Am. Dec. 361 (1848); *Peterson v. City of New York*, 17 N. Y. 449 (1858); *Rockford, R. I. & St. L. R. v. Wilcox*, 66 Ill. 417 (1872); *Santa Clara Mining Ass'n v. Meredith*, 49 Md. 389, 33 Am. Rep. 264 (1878); *CROWLEY v. MINING CO.*, 55 Cal. 273, Powell, Cas. Agency, 9 (1880); *State ex rel. Spellman v. Parke-Davis & Co.*, 191 Mo. App. 219, 177 S. W. 1070 (1915); *Altavista Cotton Mills v. Lane*, 133 Va. 1, 112 S. E. 637 (1922); *Morawetz, Corp.* §§ 338, 504.

<sup>50</sup> *Savings Bank v. Davis*, 8 Conn. 191 (1830); *Burrill v. Bank*, 43 Mass. (2 Metc.) 163, 35 Am. Dec. 395 (1840); *Hopkins v. Turnpike Co.*, 4 Humph. 403 (Tenn. 1843).

the principal. Authority to act as agent in any given manner will be implied, whenever the conduct of the principal is such as to manifest his intention to confer it.<sup>51</sup> It is indeed possible for the implication from the conduct of the principal to override the express statement that an individual is not his agent.<sup>52</sup> This so-called implication is, of course, nothing more than a logical inference from facts, and must be distinguished from those cases in which P. so conducts himself as to entitle T. to believe that A. has greater power than has, in fact, been conferred upon him. "For the sake of convenience we must make a distinction between implied authority, that is, such as the principal in fact intends the agent to have, though the intention be implied from the acts and conduct of the principal, and apparent authority, that is, such as, though not actually intended by the principal, he permits the agent to appear to

<sup>51</sup> *Kent v. Tyson*, 20 N. H. 121 (1849); *Farmers' & Mechanics' Bank v. Bank*, 16 N. Y. 125, at page 145, 69 Am. Dec. 678 (1857); *Matteson v. Blackmer*, 46 Mich. 393, 9 N. W. 445 (1881); *Sariol v. McDonald Co.*, 127 App. Div. 648, 111 N. Y. Supp. 796 (1908); *Wilson v. Haun*, 97 Kan. 445, 155 Pac. 798 (1916); *Carson v. Hunkins*, 210 Mo. App. 105, 242 S. W. 153 (1922); *Radio Corp. of America v. Radio Audion Co.*, 284 Fed. 581, at page 583 (D. C. 1922).

"No one can become the agent of another person, except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him." *Lord Cranworth*, in *Pole v. Leask*, 33 L. J. (N. S.) Ch. 155, at page 161 (1863).

Proof that one has acted for a considerable time as agent is *prima facie* proof of agency, since such conduct would naturally come to the knowledge of the principal, and the absence of dissent makes reasonable the inference that it was authorized. *Reynolds v. Collins*, 78 Ala. 94 (1884); *Neibles v. Railroad Co.*, 37 Minn. 151, 33 N. W. 322 (1887); *Anderson v. Supreme Council*, 135 N. Y. 107, 31 N. E. 1092 (1892).

<sup>52</sup> *Knights of Pythias v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762 (1899); *Seaboard Oil Co. v. Huntsman*, 196 Ky. 758, 245 S. W. 860 (1922).

have."<sup>53</sup> In the case of implied agency P. and A. have the mutual rights and liabilities of a real agency, and if T. is seeking to hold P. it is not necessary for T. to show that at the time he dealt with A. he knew the facts basing the implication, which T. must show if he is seeking to hold P. on an act of A. apparently but not really authorized.<sup>54</sup> Authority will not be conclusively presumed unless the evidence is inconsistent with any other inference.<sup>55</sup> Thus, where an agent repeatedly performs acts not expressly authorized, which the principal adopts without question, his conduct readily gives rise to the inference that he desires the agent to perform other acts of the same kind, and may hence be evidence of intention to vest the agent with authority to perform them. The weight of such evidence depends upon the circumstances of each case and the nature of the relations between the principal and agent, and its effect will, of course, be overcome by any clear expression of a contrary intention.<sup>56</sup> But where there has been a long course of dealing between agent and principal, during which the agent's authority has never been questioned, the acquiescence of the principal is strong, if not conclusive, evidence of authority to perform other acts similar to those adopted.<sup>57</sup>

<sup>53</sup> Gilfillan, C. J., in *Columbia Mill Co. v. Bank*, 52 Minn. 224, 53 N. W. 1061 (1893).

<sup>54</sup> *Wilson v. Haun*, 97 Kan. 445, 155 Pac. 798 (1916); *SIGEL-CAMPION LIVE STOCK COM. CO. v ARDOHAIN*, 71 Colo. 410, 207 Pac. 82, Powell, Cas. Agency, 12 (1922).

<sup>55</sup> See chapter IV, *infra*, for many illustrations of implications made by the courts.

<sup>56</sup> Recognition of authority in a single instance may be so comprehensive as to be sufficient. *Wilcox v. Railroad Co.*, 24 Minn. 269 (1877); *Empire Gas & Fuel Co. v. Pendar*, 244 S. W. 184 (Tex. Civ. App. 1922).

Cf. *Green v. Hinkley*, 52 Iowa, 633, 3 N. W. 688 (1879); *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568 (1887).

<sup>57</sup> *Farmers' & Mechanics' Bank v. Bank*, 16 N. Y. 125, 69 Am. Dec. 678 (1857); *Olcott v. Railroad Co.*, 27 N. Y. 546, at page 560, 84 Am. Dec. 298 (1863); *Gulick v. Grover*, 33 N. J. Law, 463, at page 467, 97 Am. Dec. 728 (1868); *Wheeler v. Benton*, 67 Minn. 293, 69 N. W. 927 (1897); *Faiola v. Calderone*, 275 Pa. 303, 119 Atl. 539 (1923).

**§ 11)****CONSTRUCTION—POWER OF ATTORNEY****25**

So thus far we have seen that one may become an agent by appointment, and that there are certain restrictions upon the generality of this statement, arising out of the manner of delegating the act or the peculiarities of the principal, and further that such appointment may occur by words or conduct.

Unfortunately human beings in the transaction of business are not invariably exact, precise, or unequivocal in their language or conduct. It therefore becomes necessary to discover what methods of construction are resorted to in determining the presence or extent of authority from the language or conduct of the principal. It is frequently of great importance to discover these limits because, when the relation of principal and agent has once become established, certain rights and obligations arise as between principal and agent.<sup>58</sup> It is the duty of the agent to conform strictly to the authority actually conferred upon him. Any departure on his part from the terms of his authority is a breach of his implied undertaking to obey the instructions of his principal, rendering him liable to respond in damages for any resulting loss, and in many cases working a total forfeiture of his right to remuneration, reimbursement, or indemnity. Finally, the rights and obligations arising between agent and third persons with whom he deals may depend upon the authority actually conferred upon him.<sup>59</sup>

**CONSTRUCTION—POWER OF ATTORNEY**

**11. A formal power of attorney is strictly construed, thus giving only such authority as it confers expressly or by necessary implication. Therefore:**

**(1) The operative part of the power is controlled by recitals; and**

<sup>58</sup> See chapters XV and XVI, infra.

<sup>59</sup> See sections 129 and 130, infra.

(2) Where authority to do particular acts is followed by general words, they are construed as enlarging the authority only so far as is necessary to accomplish the particular acts.

A formal power of attorney must be strictly construed. To bring an act within the authority conferred, it must appear on a fair construction of the whole writing that the authority is to be found within the four corners of the instrument, either by express terms or necessary implication.<sup>60</sup> For example, a power to confess judgment at a specified term of court does not confer authority to confess judgment at a later term;<sup>61</sup> a power to negotiate, make sale, dispose of, assign, and transfer promissory notes does not include power to pledge;<sup>62</sup> and it has been held that a power to sell real estate does not cover land subsequently acquired by the constituent.<sup>63</sup> Authority to act in the name of the principal, unless a contrary intention appears, confers authority to act only in his individual business and for his personal benefit.<sup>64</sup> Thus a power authorizing an

<sup>60</sup> Attwood v. Munnings, 7 B. & C. 278, 108 Rep. 727 (1827); Withington v. Herring, 5 Bing. 442, at page 458, 130 Rep. 1132 (1829); Brantley v. Insurance Co., 53 Ala. 554 (1875); Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150 (1878); Gilbert v. How, 45 Minn. 121, 47 N. W. 643, 22 Am. St. Rep. 724 (1890); Bryant v. La Banque du Peuple, [1893] A. C. 170; Kuite v. Lage, 152 Mich. 638, 116 N. W. 467, 125 Am. St. Rep. 421 (1908); Jennings v. President, etc., Manhattan Co., 203 App. Div. 802, 197 N. Y. Supp. 401 (1922).

<sup>61</sup> Rankin v. Eakin, 40 Tenn. (3 Head) 229 (1859).

<sup>62</sup> Jonmenjoy Coondoo v. Watson, L. R. 9 App. Cas. 561 (1884). It is not necessary to invoke the rule of strict construction to hold that a power to sell real estate does not include a power to mortgage it. Wood v. Goodridge, 60 Mass. (6 Cush.) 117, 52 Am. Dec. 771 (1850); Jeffrey v. Hursh, 49 Mich. 31, 12 N. W. 898 (1882).

<sup>63</sup> Penfold v. Warner, 96 Mich. 179, 55 N. W. 680, 35 Am. St. Rep. 591 (1893). For limitations on this doctrine, see Bigelow v. Livingston, 28 Minn. 57, 9 N. W. 31 (1881); Benschoter v. Lalk, 24 Neb. 251, 38 N. W. 746 (1888); Weare v. Williams, 85 Iowa, 253, 52 N. W. 328 (1892). Contra: Fay v. Winchester, 45 Mass. (4 Metc.) 513 (1842).

<sup>64</sup> Attwood v. Munnings, 7 B. & C. 278, 108 Rep. 727 (1827); North River Bank v. Aymar, 3 Hill, 262 (N. Y. 1842); Adams Exp.

agent to execute or indorse bills or notes in the name of the principal does not authorize their execution or indorsement for the agent's own benefit,<sup>65</sup> or for the accommodation of a stranger;<sup>66</sup> nor will separate powers given to one agent by two persons authorizing him to execute and indorse notes in their names, respectively, authorize him to make a joint note in the name of both principals.<sup>67</sup> On the other hand, "the object of the parties is to be kept in view, and when the language used will permit that construction should be adopted which will carry out instead of defeat the purpose of the appointment."<sup>68</sup> For this reason, with formal powers, as well as with informal powers, the grant of authority must be construed to include all medium powers which are necessary to the effective execution of the authority expressly granted,<sup>69</sup> and evidence of usage is admissible for the purpose of interpreting the authority.<sup>70</sup> Thus a power to convey has frequently been held to be implied in a power to sell real estate as necessarily incident to

*Co. v. Trego*, 35 Md. 47, at page 67 (1872); *Harris v. Johnston*, 54 Minn. 177, 55 N. W. 970, 40 Am. St. Rep. 312 (1893); *Wilson v. Wilson-Rogers*, 181 Pa. 80, 37 Atl. 117 (1897).

<sup>65</sup> *Stainer v. Tysen*, 3 Hill, 279 (N. Y. 1842); *Stainback v. Read & Co.*, 52 Va. (11 Grat.) 281, 62 Am. Dec. 648 (1854); *Camden Safe Deposit & Trust Co. v. Abbott*, 44 N. J. Law, 257 (1882).

<sup>66</sup> *Wallace v. Bank*, 1 Ala. 565 (1840); *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728 (1868).

<sup>67</sup> *Mechanics' Bank v. Schaumburg*, 38 Mo. 228 (1866). Where each of several tenants in common executed a separate power authorizing the attorney to sell and convey the constituent's interest in the land and "to sell and indorse any promissory notes that may be taken and secured by mortgage" on the land, the power did not authorize the attorney to bind his principal as indorser jointly with the other tenants, of a note taken payable jointly to all. *Harris v. Johnston*, 54 Minn. 177, 55 N. W. 970, 40 Am. St. Rep. 312 (1893).

<sup>68</sup> Field, J., in *Holladay v. Daily*, 19 Wall. 606, 22 L. Ed. 187 (U. S. 1873). See, also, *Le Roy v. Beard*, 8 How. 451, at page 468, 12 L. Ed. 1151 (U. S. 1850); *Hemstreet v. Burdick*, 90 Ill. 444 (1878).

<sup>69</sup> *Howard v. Baillie*, 2 H. Bl. 618 (1796); *Witherington v. Harring*, 5 Bing. 442, 130 Rep. 1132 (1829); *Le Roy v. Beard*, 8 How. 451, at page 466, 12 L. Ed. 1151 (U. S. 1850).

<sup>70</sup> See section 15, infra.

its effectual execution,<sup>71</sup> and a power to convey has been held to include by implication power to convey with general warranty, where a general warranty is a common and usual mode of assurance at that time and place on the sale of real estate.<sup>72</sup> In questions of construction, precedents and even rules are of comparatively little value, since each case varies according to the language of the particular instrument and the other facts of the situation. One or two rules, however, offer some practical guidance in the construction of powers. Thus the grant of authority is generally controlled by the recitals. Where a power recited that the constituent was going abroad, and the operative part gave authority in general terms, it was held that the authority was limited to the duration of the principal's sojourn abroad.<sup>73</sup> So, also, where authority to do particular acts is followed by general words, the general words are restricted to what is necessary to the performance of the particular acts, and are to be construed as enlarging the authority granted only when such construction is necessary to effectuate the purpose for which the authority is given.<sup>74</sup> Thus, under a power to demand and receive all moneys due and "to transact all business," the words "all business" were construed to mean all business necessary for the recovery of the moneys, and hence it was held

<sup>71</sup> Valentine v. Piper, 39 Mass. (22 Pick.) 85, 33 Am. Dec. 715 (1839); Hemstreet v. Burdick, 90 Ill. 444 (1878); Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59 (1885).

<sup>72</sup> Peters v. Farnsworth, 15 Vt. 155, 40 Am. Dec. 671 (1843); Le Roy v. Beard, 8 How. 451, 12 L. Ed. 1151 (U. S. 1850); Schultz v. Griffin, 121 N. Y. 294, 24 N. E. 480, 18 Am. St. Rep. 825 (1890).

<sup>73</sup> Danby v. Coutts, L. R. 29 Ch. D. 500 (1885).

<sup>74</sup> Attwood v. Munnings, 7 B. & C. 278, 108 Rep. 727 (1827); Wood v. Goodridge, 60 Mass. (6 Cush.) 117, 52 Am. Dec. 771 (1850); Harper v. Godsell, L. R. 5 Q. B. 422 (1870); POLLOCK v. COHEN, 32 Ohio St. 514, Powell, Cas. Agency, 154 (1877); Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150 (1878); Mexican Nat. Coal, etc., Co. v. Frank (C. C.) 154 Fed. 217, at page 231 (1907); U. S. Nat. Bank v. Herron, 73 Or. 391, 144 Pac. 661, L. R. A. 1916C, 125 (1914); Wells v. McKay, 157 Ark. 360, 248 S. W. 276 (1923). .

that the power did not confer authority to indorse a bill of exchange received by the agent under the power,<sup>75</sup> and generally, where the authority to do particular acts is followed by a broad grant of authority "to do all other acts which the principal could do in person," "to transact all business," and like phrases, the particular authority granted will be taken as indicating the true purpose of the agency, and the general authority will be construed as enlarging the particular authority only so far as is necessary to accomplish that purpose.<sup>76</sup> Indeed, this rule applies with much the same force, if less frequently, to cases where the authority is conferred orally.<sup>77</sup>

Where authority is conferred by written instrument, that authority cannot be enlarged or varied by parol evidence.<sup>78</sup> This rule applies, of course, only when the parol evidence is offered to contradict or vary the terms of a writing from which the authority is solely derived. Parol evidence of a subsequent grant of authority enlarging or varying the authority previously granted is admissible, provided that the authority is not of a kind that must be conferred by writing.<sup>79</sup> Thus the parol evidence rule has been held to exclude evidence of usage or custom when such evidence was offered to enlarge or to vary the express terms of a written authority.<sup>80</sup> Evidence of usage may, however, be admitted to interpret the authority, since even a formal power is to

<sup>75</sup> *Hay v. Goldsmidt* (1805), stated in *Hogg v. Snaith*, 1 *Taunt.* 347, 127 *Rep.* 867 (1808).

<sup>76</sup> *Esdaile v. La Nauze*, 1 *Y. & C. Ex.* 394, 160 *Rep.* 160 (1835); *White v. Young*, 122 *Ga.* 830, 51 *S. E.* 28 (1905).

<sup>77</sup> *Wood v. McCain*, 7 *Ala.* 800, 42 *Am. Dec.* 612 (1845); *Gulick v. Grover*, 33 *N. J. Law*, 463, 97 *Am. Dec.* 728 (1868).

<sup>78</sup> *Claffin v. Continental Jersey Works*, 85 *Ga.* 27, at page 38, 11 *S. E.* 721 (1890).

<sup>79</sup> *Williams v. Cochran*, 7 *Rich.* 45 (S. C. 1853); *HARTFORD FIRE INSURANCE CO. v. WILCOX*, 57 *Ill.* 180, *Powell, Cas. Agency*, 14 (1870); *Magill v. Stoddard*, 70 *Wis.* 75, 35 *N. W.* 346 (1887).

<sup>80</sup> *Hogg v. Snaith*, 1 *Taunt.* 347, 127 *Rep.* 867 (1808); *Delafield v. State of Illinois*, 26 *Wend.* 192 (*N. Y.* 1841).

be construed as actually conferring such powers as are reasonably necessary for its effectual execution, and hence as including in such cases customary and usual powers.<sup>81</sup>

### CONSTRUCTION—INFORMAL EXPRESS AUTHORITY—GENERAL RULE

12. Where authority is expressly conferred upon an agent otherwise than by formal power of attorney, the authority is construed liberally, with a view to accomplish the object of the authority, and with such enlargements as are shown to have been reasonably intended under the usages of business.

If the authority of the agent is conferred by the conduct, words, or writing not under seal of the principal, a more liberal construction will generally obtain.<sup>82</sup> This distinction in the rules of construction applied to powers under seal and to powers not under seal is not arbitrary, but rests upon the formal nature of an instrument under seal and upon the assumed care with which a principal is presumed to have outlined and defined his representative's authority in an instrument of that type. Commercial instruments, such as orders and letters of instruction, are construed with greater liberality, because they are generally drawn by laymen in a loose and inartificial manner, and leave much for inference and implication.<sup>83</sup> A fortiori the same liberal construction prevails where the grant of authority is oral. Nevertheless in every case the question is one of intention,

<sup>81</sup> *Reese v. Medlock*, 27 Tex. 121, at page 123, 84 Am. Dec. 611 (1863); *HARTFORD FIRE INSURANCE CO. v. WILCOX*, 57 Ill. 180, Powell, Cas. Agency, 14 (1870); *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820 (1886); *Story, Ag.* §§ 76, 77.

<sup>82</sup> *Pole v. Leask*, 28 Beav. 562, 29 L. J. Ch. 888 (1860); *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150 (1878); 14 Mich. Law Rev. 506.

<sup>83</sup> *Story, Ag.* § 75.

and if the intention is clearly expressed, at least as between principal and agent, the authority must be strictly pursued.<sup>84</sup>

### CONSTRUCTION—INFORMAL EXPRESS AUTHORITY—AMBIGUITY

13. Where authority is conferred in such terms as to be capable of more than one construction, an act done by the agent in good faith which is warranted by one construction is deemed to have been authorized, although that construction was not intended by the principal.

Where authority is conferred in such terms as to be fairly susceptible of more than one construction, and one of these constructions is in good faith adopted and acted upon by the agent, the principal cannot claim that such act was unauthorized, as against either the agent or the third person, merely because the construction adopted was not intended by him. The principal must bear the consequences if the departure from his intention was due to his failure to give his instructions in clear and unambiguous terms.<sup>85</sup> Obviously this rule can have little application to formal powers under the rules of strict construction hereinbefore discussed.<sup>86</sup>

<sup>84</sup> *Bertram v. Godfray*, 1 Knapp, Pr. C. 381 (1830); *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612 (1845); *Matthews v. Sowle*, 12 Neb. 398, 11 N. W. 857 (1882).

<sup>85</sup> *De Tastett v. Crousellat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828 (1807); *Le Roy v. Beard*, 8 How. 451, at page 468, 12 L. Ed. 1151 (U. S. 1850); *Bessent v. Harris*, 63 N. C. 542 (1869); *Ireland v. Livingston*, L. R. 5 H. L. 395 (1871); *WINNE v. INSURANCE CO.*, 91 N. Y. 185, Powell, Cas. Agency, 18 (1883); *Clausen v. Title Guaranty & Surety Co.*, 168 App. Div. 569 at page 574, 153 N. Y. Supp. 835, aff'd., 222 N. Y. 675, 119 N. E. 1035 (1915).

<sup>86</sup> See *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150 (1878).

### CONSTRUCTION—INFORMAL EXPRESS AUTHORITY—INCIDENTAL POWERS IMPLIED

14. Every agent in the execution of his express authority has implied authority to do whatever is reasonably necessary to its effective execution unless the principal has indicated a contrary intention.

Authority to accomplish a particular end necessarily includes authority to employ all means reasonably necessary for its accomplishment unless such means be expressly excluded.<sup>87</sup> As we have seen even a formal power of attorney is considered as conferring medium powers necessary for its effective execution.<sup>88</sup> These rules are necessarily very general and vague. What is reasonably necessary must, of course, depend upon the object sought to be accomplished and the circumstances of the particular case. It is not easy, indeed, to draw a line between the powers which are implied from usage and custom<sup>89</sup> and those which are implied as necessarily incident to the effective execution of the authority conferred. The general application of the rule will be seen from the illustrations given.

Thus an agent, authorized to receive and sell certain goods and pay himself a debt out of the proceeds, has au-

<sup>87</sup> Peck v. Harriott, 6 Serg. & R. 146, 9 Am. Dec. 415 (Pa. 1820); SPRAGUE v. GILLETT, 50 Mass. (9 Metc.) 91, Powell, Cas. Agency, 22 (1845); Dingle v. Hare, 7 C. B. (N. S.) 145, at page 156, 141 Rep. 770 (1859); Pole v. Leask, 28 Beav. 562, 29 L. J. Ch. 888 (1860); NATIONAL BANK v. BANK, 112 Fed. 726, 50 C. C. A. 443 (1902); LAW REPORTING CO. v. GRAIN CO., 135 Mo. App. 10, 115 S. W. 475, Powell, Cas. Agency, 19 (1909); Beheret v. Myers, 240 Mo. 58, at page 79, 144 S. W. 824 (1911); Quint v. O'Connell, 89 Conn. 353, 94 Atl. 288 (1915); Martin & Hicks v. Bridges & Jeeks Co., 18 Ga. App. 24, 88 S. E. 747 (1916); Allen Gravel Co. v. Nix, 129 Miss. 809, 93 South. 244 (1922); Blackwell v. Rainier Golf & Country Club, 120 Wash. 384, 208 Pac. 21 (1922).

<sup>88</sup> See cases in footnotes 68, 69, p. 27, supra.

<sup>89</sup> See section 15, infra.

thority to bring an action against a person wrongfully withholding possession.<sup>90</sup> An agent authorized to sell certain goods, the sale price of which depended upon many facts discussed in a court proceeding, was held authorized to purchase on the credit of his principal a copy of the testimony in that court proceeding.<sup>91</sup> An agent authorized to enter into a binding contract has authority to sign a memorandum to satisfy the statute of frauds.<sup>92</sup> An agent employed to find a purchaser for property has authority to describe it to a prospective purchaser and to make representations as to facts affecting its value.<sup>93</sup> A broker with whom land is placed for sale has no incidental authority to sign a binding contract of sale on behalf of the owner.<sup>94</sup> An agent authorized to secure immediate possession of a storeroom may bind his principal by contract to pay a bonus therefor, if it cannot be otherwise obtained.<sup>95</sup> An agent sent to hurry forward goods, and instructed to see that there is no delay in shipping them, has authority to bind his principal by a contract to pay wharfage due on the goods in order to release them from a claim of lien under which they are held.<sup>96</sup> An agent employed to obtain subscriptions to an agreement to form a joint-stock company to control certain lands has authority to make representations as to the location and quality of such lands.<sup>97</sup> An agent employed to travel about the country and sell goods has incidental authority to hire a horse to assist him to get

<sup>90</sup> *Curtis v. Barclay*, 7 D. & R. 539 (1826).

<sup>91</sup> *LAW REP. CO. v. GRAIN CO.*, 135 Mo. App. 10, 115 S. W. 475, Powell, Cas. Agency, 19 (1909).

<sup>92</sup> *Durrell v. Evans*, 1 H. & C. 174, 158 Rep. 848 (1862).

<sup>93</sup> *Mullens v. Miller*, L. R. 22 Ch. D. 194 (1882); *Sioux City Tire & Manufacturing Co. v. Harris*, 190 N. W. 142 (Iowa, 1922).

<sup>94</sup> *McDermott v. Drumm*, 96 Conn. 670, 115 Atl. 476 (1921); *Grinde v. Chipman*, 175 Wis. 376, 185 N. W. 288 (1921); *Fain v. Barr*, 241 S. W. 204 (Tex. Civ. App. 1922).

<sup>95</sup> *Shackman v. Little*, 87 Ind. 181, at page 185 (1882).

<sup>96</sup> *Robinson v. Iron Co.*, 39 Hun, 634 (N. Y. 1886).

<sup>97</sup> *Sandford v. Handy*, 23 Wend. 260 (N. Y. 1840).

from place to place, or at least in such a case a jury would be justified in making an inference of such incidental authority in the agent.<sup>98</sup> In most of the cases which have been used as illustrations herein it would not be true to state that as a matter of law the agent has the authority mentioned, but the fact-finding part of the tribunal before which the case is tried would be justified in making such an inference from such an agency. The existence, therefore, of these incidental powers, is normally a question of fact dependent upon the circumstances of the particular case.<sup>99</sup>

#### CONSTRUCTION—INFORMAL EXPRESS AUTHORITY—IMPLICATIONS FROM USAGE

15. Every agent in the execution of his expressed authority has authority to act in accordance with the established usages and customs of the particular business which he is employed to transact, or of the particular agency in which he is employed, unless his principal has indicated a contrary intention.

The authority of an agent is to be construed in the light of the established usages and customs of the business in which he is employed. Where one person employs another to transact business for him, it is reasonable to infer that he intends the agent to transact the business according to the recognized usages and customs of the particular business or of the place in which it is to be transacted, and hence, in the absence of any indication of a contrary intention, the agent's authority will be enlarged or limited,

<sup>98</sup> *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516 (1884). As to the significance of a usage for firms to furnish such an agent money with which to pay for such service, see *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827 (1881).

<sup>99</sup> *Forest Hill Ass'n v. Fisher*, 140 Md. 666, 118 Atl. 164 (1922).

as the case may be, in accordance with any such usage or custom.<sup>1</sup> In order that any particular usage may be thus read into the authority, it must be established; that is, it must be so general that it is generally known, and hence it will be presumed to be intended by the principal that the agent shall act according to such usage or custom. If these facts are shown, it is not essential that it be actually known to P.<sup>2</sup> If it is not established in this sense, it must appear that it was known to P.<sup>3</sup> The usage must be legal; that is, it must not be in conflict with sound policy and good morals.<sup>4</sup> It must be reasonable.<sup>5</sup> Evidence of usage cannot be admitted to change the intrinsic character of the agency,<sup>6</sup> and of course usage can never confer au-

<sup>1</sup> Thus a person who employs a broker on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though such plaintiff may himself be ignorant of the rules. *SUTTON v. TATHAM*, 10 Ad. & E. 27, 113 Rep. 11, Powell, Cas. Agency, 23 (1839); *Upton v. County Mills*, 65 Mass. (11 Cush.) 586, 59 Am. Dec. 163 (1853); *Sumner v. Stewart*, 69 Pa. 321 (1872); *Kraft v. Fancher*, 44 Md. 204 (1876); *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392 (1876); *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876 (1887); *JOHNSTON v. MILWAUKEE WYOMING INVESTMENT CO.*, 46 Neb. 480, 64 N. W. 1100, Powell, Cas. Agency, 26 (1895); *Hall v. Paine*, 224 Mass. 62, 112 N. E. 153, L. R. A. 1917C, 737 (1916); *Ismert-Hincke Milling Co. v. Mercurio Bros.*, 243 S. W. 408 (Mo. App. 1922).

A custom of the place where P. is located will not control T.'s rights at another place, where the custom does not exist. *Byrne v. Massachusetts Packing Co.*, 137 Mass. 313 (1884).

<sup>2</sup> *SUTTON v. TATHAN*, 10 Ad. & E. 27, 113 Rep. 11, Powell, Cas. Agency, 23 (1839); *Bailey v. Bensley*, 87 Ill. 556 (1877); *Guesnard v. Railroad Co.*, 76 Ala. 453 (1884); *Hibbard v. Peek*, 75 Wis. 619, 44 N. W. 641 (1890); *Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb. 554, 53 N. W. 475 (1892).

<sup>3</sup> *Sweeting v. Pearce*, 7 C. B. (N. S.) 449, 141 Rep. 890 (1859); *Robinson v. Mollett*, L. R. 7 H. L. 802 (1875); *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573 (1887).

<sup>4</sup> *Day v. Holmes*, 103 Mass. 306 (1869); *Evans v. Waln*, 71 Pa. 69 (1872); *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102 (1893).

<sup>5</sup> *Whitney v. Esson*, 99 Mass. 308, 96 Am. Dec. 762 (1868); *Robinson v. Mollett*, L. R. 7 H. L. 802 (1875).

<sup>6</sup> See cases in footnote 3, p. 35, *supra*.

thority as against the positive instructions of the principal, although it may confer power to bind the principal to T., as we shall see hereafter. Illustrations of the part played by usage and custom in interpreting the authority expressly conferred upon agents can be multiplied indefinitely. For example, an agent employed to sell has implied authority to sell with customary warranty,<sup>7</sup> and to sell on credit, if it is customary in such sales to sell on credit.<sup>8</sup> A broker who is employed to transact business at a certain place has implied authority to act in accordance with the reasonable usages of that place,<sup>9</sup> and, if he is a member of the Stock Exchange, has implied authority to buy and sell and generally to govern himself according to the usages of the Stock Exchange.<sup>10</sup> Other illustrations will be given in discussing the scope of various particular authorities.<sup>11</sup>

<sup>7</sup> *Dingle v. Hare*, 7 C. B. (N. S.) 145, 141 Rep. 770 (1859); *Smith v. Tracy*, 36 N. Y. 82 (1867); *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4 (1878); *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876 (1887); *Morris & Co. v. Bynum Bros.*, 207 Ala. 541, 93 So. 467 (1922); *Western Silo Co. v. Knowles*, 88 Okl. 176, 212 Pac. 429 (1923).

<sup>8</sup> *Pelham v. Hilder*, 1 Y. & C. C. C. 3 (1841).

<sup>9</sup> *Pollock v. Stables*, 12 Q. B. 765 (1848); *Cropper v. Cook*, L. R. 3 C. P. 194 (1868); *Bailey v. Bensley*, 87 Ill. 556 (1877).

<sup>10</sup> *Young v. Cole*, 3 Bing. N. C. 724, 132 Rep. 589 (1837); *Nickalls v. Merry*, L. R. 7 H. L. 530 (1875); *BIBB v. ALLEN*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; *Powell, Cas. Agency*, 390 (1893); *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102 (1893).

<sup>11</sup> See, chapter IV, infra.

## CHAPTER III

### POWER OF AN AGENT TO BIND HIS PRINCIPAL IN CONTRACT

16. Estoppel or Contract Found in Expressed Agreement.
17. Ability of A., by His Own Conduct, to Enlarge His Power to Bind P. to T.
18. Special Instructions.
19. Notice to T. of Limitations upon A.'s Authority.
20. Authority and Power of a Public Agent.
21. Significance of Manner in Which A. Exercises His Authority or Power.
22. Agency from Necessity.

### ESTOPPEL OR CONTRACT FOUND IN EXPRESSED AGREEMENT

16. The liability of a disclosed P. to T. upon contract unauthorized in fact may be explained as based upon "agency by estoppel," or as an application of the objective theory of contracts. The latter is preferable.

Cases in which the agent acted within the limits set for him by the principal, and thereby imposed contractual obligations upon the principal, were dealt with in the preceding chapter. But sometimes persons assume to act as agents who have not been authorized, and, more frequently, persons who are actually agents for some purposes act beyond the limits set for them. It is therefore the purpose of this chapter to discuss those cases in which one individual is legally able to impose contractual liability upon another individual, although such action is, as between the immediate parties, unauthorized. In these cases the agent has the *power* rather than the *authority* to bind his principal in contract to a third person.

One person may have the power<sup>1</sup> to bind another as a

<sup>1</sup> The utility of the distinction between the "authority" and the

principal upon a contract, where no actual authority exists,<sup>2</sup> or in cases where the act done is done in excess of the authority actually possessed.<sup>3</sup> Thus the principal is bound by a warranty given by a sales agent, if the warranty is a usual one, although he has directed the agent not to warrant, provided the buyer was not aware of this limitation.<sup>4</sup> So, also, where a person, who traveled about selling his own goods, was authorized to sell the plaintiff's goods for cash on commission, and it was usual for such agents to fix the terms of sale, including the time, place, and mode of payment, and the agent sold goods on credit, which were forwarded by the principal, addressed to the buyer, C. O. D. by express, it was held that the defendant expressman, being without notice of the agent's want of authority, was justified in delivering the goods without payment, when directed so to do by the agent.<sup>5</sup>

"power" of an agent is emphasized by Professor Mecham. Mecham, Agency (2d Ed.) § 712.

<sup>2</sup> Rice v. James, 193 Mass. 458, 79 N. E. 807 (1907); McIntyre v. Smyth, 108 Va. 736, at page 740, 62 S. E. 930 (1908); Metzger Bros. v. Whitehurst, 147 N. C. 171, 60 S. E. 907 (1908); Morgan v. Harper, 236 S. W. 71 (Tex. Com. App. 1922).

<sup>3</sup> "As to third parties the liability of the principal for the acts of his agent is measured, not merely by the authority actually given, but by the authority essential to the business of the agency and the authority held out by the principal as possessed by the agent or the apparent authority which he permits the agent to assume." Lauer Brewing Co. v. Schmidt, 24 Pa. Super. Ct. 396, at page 401 (1904); JOHNSTON v. MILWAUKEE & WYOMING INVESTMENT CO., 46 Neb. 480, at page 487, 64 N. W. 1100, Powell, Cas. Agency, 26 (1895); Union Pac. R. Co. v. Gregory Coal Co., 103 Neb. 421, 172 N. W. 362 (1919); Petersen v. Pacific American Fisheries, 108 Wash. 63, 183 Pac. 79, 8 A. L. R. 198 (1919); PATTERSON v. WILLIAMS, 206 Ala. 527, 91 South. 315, Powell, Cas. Agency, 30 (1921); Pennyroyal Fair Ass'n v. Hite, 195 Ky. 732, 243 S. W. 1046 (1922); Strickland v. S. H. Kress & Co., 183 N. C. 534, 112 S. E. 30 (1922).

<sup>4</sup> See chapter IV, footnotes 39, 51-56, pp. 71, 72, 73.

<sup>5</sup> "We have a case, then, where the agent was apparently clothed with the authority to sell the plaintiff's goods, without limitation as to the quantity, and on commission, for cash or on credit, as he might think proper; and, this being so, Moore must be regarded, in respect to third persons as the plaintiff's general agent, whose authority

There are two distinct views as to the basis for this liability of P.<sup>6</sup> The theories of these two views are fundamentally different. The estoppel theory is the inevitable resultant of two forces, namely, the civil-law emphasis upon the will, which became an integral part of the philosophy, law, and economics of the common-law countries in the first half of the nineteenth century,<sup>7</sup> and the requirements of business convenience. Under a theory of contracts requiring mental assent and an intent to form a legal relation, it was obviously impossible to hold that a *contract* had resulted, where the agent had acted otherwise than in strict conformity to his actual authority. It soon became equally clear that business convenience, and the continued utility of agents required that P. be held liable in many cases where A. had acted in an unauthorized manner.<sup>8</sup> From this sit-

would not be limited by instructions not brought to the notice of such third persons. \* \* \* As to him the agent's apparent authority was real authority." *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45 (1871).

See, also, *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840 (1897), and *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827 (1881).

<sup>6</sup> *Ewart, Estoppel; Ewart*, 5 Col. Law Rev. 354; 16 Harv. Law Rev. 186; *Huffcut, Agency*, pp. 66 ff. and 128 ff., present the estoppel theory; while *Cook*, 5 Col. Law Rev. 36, and 6 Col. Law Rev. 34; 13 Green Bag 50; 15 Harv. Law Rev. 324, present the real contract theory. See, also, *JOHNSTON v. MILWAUKEE & WYOMING INVESTMENT CO.*, 46 Neb. 480, 64 N. W. 1100, *Powell, Cas. Agency*, 26 (1895).

<sup>7</sup> *Williston, Contracts*, §§ 20-22, 94, 1535. See, also, *Patterson*, 33 Harv. Law Rev. 198, at 209 ff. Professor Williston has clearly demonstrated that the requirement of an actual meeting of the inner intents of the contracting parties is a concept of the civil law, which had no place in the common law of contracts until enunciated by Savigny, and popularized by Anson, Pollock, and other writers of the nineteenth century, and which is wholly unsuited to the common law of contracts.

<sup>8</sup> "It would be absurd to apply to the general business of life the doctrine as to the necessity of ascertaining whether an agent is acting within the scope of his authority; indeed, the business of London could not go on." *Pollock, C. B.*, in *Smith v. McGuire*, 3 H. & N. 554, 157 Rep. 589 (1858). See, also, *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, at page 423 (1872).

uation developed a new application of the doctrine of estoppel.<sup>9</sup> Thus many courts have held that, where P. by his voluntary act has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, reasonably would believe that such agent has authority to perform on behalf of his principal a particular act, such particular act having been performed, the principal is estopped as against such innocent third person from denying the agent's authority to perform it.<sup>10</sup> It is not necessary that the representation be made with the actual intention that it be acted upon by T.; it is enough if, whatever the real intention, the representation be so made that T., acting as a reasonable man, will have cause to believe and does believe that it is meant to be acted upon, and does act in reliance upon it.<sup>11</sup> Some courts have permitted such an estoppel to be based on a representation negligently made.<sup>12</sup>

<sup>9</sup> The development of this doctrine was doubtless aided by the general statement of Holt, C. J., in *Hern v. Nichols*, 1 Salk. 289, that "it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." This is, however, a statement which is by no means universally applicable. *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700 (1896).

<sup>10</sup> *JOHNSTON v. MILWAUKEE & WYOMING INVESTMENT CO.*, 46 Neb. 480, at page 490, 64 N. W. 1100, Powell, Cas. Agency, 26 (1895); *Dispatch Printing Co. v. National Bank of Commerce*, 115 Minn. 157, 132 N. W. 2 (1911); *Trollinger v. Fleer*, 157 N. C. 81, 72 S. E. 795 (1911); *Sinclair v. Investors' Syndicate*, 125 Minn. 311, 146 N. W. 1109 (1914); *Commonwealth Finance Corp. v. Schutt*, 116 Atl. 722 (N. J. Err. & App. 1922).

<sup>11</sup> *Freeman v. Cooke*, 2 Ex. 654, 154 Rep. 652 (1848); *Reynell v. Lewis*, 15 M. & W. 517, 153 Rep. 954 (1846); *Bradish v. Belknap*, 41 Vt. 172 (1868); *Sax v. Drake*, 69 Iowa, 760, 28 N. W. 423 (1886); *Johnson v. Hurley*, 115 Mo. 513, 22 S. W. 492 (1893); *Metzger Bros. v. Whitehurst*, 147 N. C. 171, 60 S. E. 907 (1908).

<sup>12</sup> Payment to a person found in a merchant's counting house and appearing to be intrusted with the business there is good, though he be not in the merchant's employ. "The debtor has a right to suppose that the tradesman has the control of his own premises, and that he will not allow persons to come there and intermeddle with his business without his authority." Lord Tenterden, in *Barrett v. Deere, Moo. & M.* 200.

The estoppel so established may confer power upon a person who is not an agent at all, or may confer a power upon a real agent in excess of the actual authority possessed. This application of estoppel is anomalous, because it permits the use of an estoppel as an offensive weapon, rather than as a protective device, and thus permits T. to avail himself of an estoppel as an instrument of gain or profit.<sup>13</sup>

But the subjective theory of contracts has yielded to the theory that there is a contract, if there is a meeting of the minds *as expressed* between the parties. Thus, if the words or conduct of the parties, viewed objectively, evidences an agreement, the requirements of law are satisfied.<sup>14</sup> Upon this theory whenever P. by words or conduct has represented to T. that A. has certain authority, then, for the purposes of T., A. has power measured by the representations, and the contract, negotiated by T. through A., is the real contract of P.<sup>15</sup> Some cases will not fall within either of the two groups thus far discussed; that is, they do not

So, also, as to delivery of merchandise at a private residence, GALBRAITH & GRANT, LIMITED, v. BLOCK, [1922] 2 K. B. 155, Powell, Cas. Agency, 31; and as to jewels left by hotel guest with a man behind hotel desk, Kanelles v. Locke, 12 Ohio App. Rep. 210 (1919); and as to baggage check left with one in apparent charge of baggage transfer office, Miltenberger v. Hulett, 188 Mo. App. 273, 175 S. W. 111 (1915).

See, also, Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49 (1884); Columbia Mill Co. v. Nat. Bank, 52 Minn. 224, 53 N. W. 1061 (1893); Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086 (1899); section 2317, Cal. Civil Code.

<sup>13</sup> 21 C. J. 1118; Ramsey v. Chilson, 57 Cal. App. 785, 208 Pac. 319 (1922).

<sup>14</sup> Williston, Contracts (1921 Ed.) §§ 20 and 21. "To lead a person reasonably to suppose that you assent to an oral arrangement is to assent to it, wholly irrespective of fraud. Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design or the interpretation of words." O'Donnell v. Clinton, 145 Mass. 461, 14 N. E. 747. See VAN PRAAGH v. EVERIDGE [1902] 2 Ch. 266, Powell, Cas. Agency, 55.

<sup>15</sup> Holmes, 5 Harv. Law Rev. 1; Brager v. Levy, 122 Md. 554, 90 Atl. 102 (1914); Petersen v. Pacific American Fisheries, 108 Wash. 63, 183 Pac. 79, 8 A. L. R. 198 (1919); Bowen v. Stallings, 158 Ark. 640, 243 S. W. 798 (1922); Heckel v. Cranford Country Club, 117 Atl. 607

present situations in which A.'s act either conforms to what P. told A. to do, or to what P. represented to T. was within A.'s power. Suppose that P. has made no representation whatever to T., but has given A. specific authority, limiting it by instructions which A. could not communicate to T. without lessening his efficiency as P.'s agent. For instance, P. tells A. that he desires A. to sell his horse, but that A. must not take less than \$200 for it. If A., when negotiating with T., should tell T. that he "must not take less than \$200 for the horse," it is apparent that he would have discarded any possibility of obtaining a larger sum for the animal, and would thereby lessen his efficiency as P.'s agent. In such a case, if A. violates the secret instructions, but acts within what P. may reasonably be said to have authorized A. to tell T. as to his authority, there is a real contract between P. and T., judged objectively.<sup>16</sup> Thus a disclosed principal is liable to T., on a contract negotiated by A., if either: (1) P. has told A. to do the act

(N. J. Err. & App. 1922); Krstovic v. Van Buren, 200 App. Div. 278, 193 N. Y. Supp. 181 (1922).

"Such apparent authority is the real authority so far as affects the rights of a third party without knowledge or notice." PATTERSON v. WILLIAMS, 206 Ala. 527, 91 South. 315, Powell, Cas. Agency, 30 (1921).

Still, as between the principal and the agent, the agent's act is within his *power*, but not within his *authority*. Thus the agent may succeed in binding his principal to the third person, but be liable to his principal for having done so.

It seems to be unsettled whether an act done by an agent within his power, but in excess of his authority, confers *liabilities* upon the third person as well as rights. Professor Oliphant, in a book review in 19 Michigan Law Review, 358, at page 361, suggests that the objective standard should be applied to fix the liabilities of the one who has created reasonable expectations, to the one who has reasonably relied upon the expectations so created, but that the subjective standard should determine the rights of such a person. This would mean that a principal would become liable to a third person when an agent has acted within his power, although beyond his authority, but that such a principal, in such a case, would not thereby gain a right to compel the third person to perform.

<sup>16</sup> See footnote 47, p. 52, *infra*.

which he has done; or if (2) P. has told T. that A. has authority to do the act which A. has done; or if (3) P. has told A. to tell T. that he, A., has authority to do the act which A. has done. These rules may be referred to conveniently as "the P. A. T. rules."

The doctrine of "agency by estoppel" became unnecessary with the abandonment of the subjective theory of contracts. It is not only unnecessary, but also inadequate, since it does not explain the case where an agent has made an unauthorized bilateral contract, but still within the scope of A.'s authority as represented by P. to T.<sup>17</sup> Suppose that P. by words or conduct represents to T. that A. has authority to sell P.'s horse. This representation is untrue in fact, but in reasonable reliance thereon T. exchanges his promise to buy the horse for A.'s promise, made on behalf of P., to sell the horse for \$100. To maintain an estoppel, the one asserting it must show that, in reliance upon the untrue representation, he has changed his position prejudicially.<sup>18</sup> All that T. has done is to make a promise. Does this making of a promise alter his legal relations? It does if A.'s promise is binding on P.; otherwise, not. So, if we say that T. gains a right by estoppel against P. in this case, we are assuming that A.'s promise is binding on P., and, basing our argument upon this assumption alone, we conclude that P. is bound. Under the objective contract theory, P. is liable without any assumption of the truth of the conclusion we seek to demonstrate.

In spite of these defects in the theory of agency by estoppel, courts still frequently utilize it as the explanation of the results reached. This does not mean that the courts, in such cases, are reaching unsound results. Apart from

<sup>17</sup> See *Smith v. McGuire*, 3 H. & N. 554, 157 Rep. 589 (1858), where the contract was negotiated August 3, notice was given by P. to T. that A. had exceeded his authority on December 19, and performance became due according to the negotiations of A. and T. on January 1.

<sup>18</sup> *Du Cote et al. v. Wilkenda Land Co.*, 123 Atl. 265 (Conn. 1924); Ewart, *Estoppel* (1900 Ed.) p. 181.

the bilateral contract cases, in which no act of reliance apart from the promise can be shown—and these, doubtless, are relatively rare of occurrence—the same result will be reached, whether the court uses the legal tool which we call "agency by estoppel," or that legal device known as "the objective theory of contracts." Thus, when an agent has engaged in a course of conduct not actually authorized, and this course of conduct has been known to his employer, and no steps have been taken by the employer to end such action, it is reasonable for P. to be bound to T. by A.'s continuance of such conduct. Of course the facts must be known to T.<sup>19</sup> in order to make out either an estoppel or a contract according to the objective standard. Similarly the previous conduct of A. should be known by P., in order to make significant, P.'s failure to terminate A.'s course of action.<sup>20</sup> In New York, however, a curious doctrine has found root, to the effect that, if P.'s lack of knowledge as to A.'s previous course of conduct was due to negligence, then P. shall be held liable to T., even though he did not, in fact, know of A.'s previous course of conduct.<sup>21</sup>

Some courts have held that, even though A.'s act conforms to the authority which P. has represented A. to T. as possessing, still, if A. acts in reality for his own benefit,

<sup>19</sup> *Martin v. Great Falls Mfg. Co.*, 9 N. H. 51 (1837); *Rathbun v. Snow*, 123 N. Y. 343, at page 350, 25 N. E. 379, 10 L. R. A. 355 (1890); *Keyes & Co. v. Union Pac. Tea Co.*, 81 Vt. 420, 71 Atl. 201 (1908); *Dispatch Printing Co. v. Nat. Bank of Commerce*, 115 Minn. 157, 132 N. W. 2 (1911); *Hattemer v. Davis*, 206 Ala. 613, 91 South. 321 (1921); *Deane v. Big Spring Distilling Co.*, 138 Md. 388, 113 Atl. 891 (1921); *Allen v. San Francisco Produce Exch.*, 59 Cal. App. 93, 210 Pac. 41 (1922).

<sup>20</sup> *Oberne v. Burke*, 30 Neb. 581, at page 588, 46 N. W. 838 (1890); *Blanke Tea & Coffee Co. v. Rees Printing Co.*, 70 Neb. 510, 97 N. W. 627 (1903).

<sup>21</sup> *Hanover Bank v. American Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721 (1896); Whitney, "Agency Imputed from Course of Business," 3 Col. Law Rev. 395.

P. is not bound.<sup>22</sup> This is an unjustifiable restriction upon the liability of P. on contracts negotiated by A., arising from a failure to distinguish between the basis for that liability, and the basis for the tort rule of respondeat superior.<sup>23</sup>

#### ABILITY OF A., BY HIS OWN CONDUCT, TO ENLARGE HIS POWER TO BIND P. TO T.

17. Normally, A., by his own conduct, cannot increase his power to bind P. to T. on contract. The rule of *North River Bank v. Aymar* permits A. to do so under certain circumstances.

Thus, where P. by words or conduct has represented to T. that A. has certain authority, and A.'s act actually conforms to the represented authority, P. is bound to T., who has relied upon such representation.<sup>24</sup> The liability of P.

<sup>22</sup> *Hambro v. Burnand* [1903] 2 K. B. 399; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998 (1881).

<sup>23</sup> *North River Bank v. Aymar*, 3 Hill, 262 (1842); 3 Col. Law Rev. 585. See, also, section 42, infra.

<sup>24</sup> *J. C. Bogert Co. v. Harpooleian*, 74 Misc. Rep. 478, 132 N. Y. Supp. 367 (1911); *Culver v. Nichols*, 140 Md. 448, 117 Atl. 873 (1922); *Sickinger v. Raymond*, 178 Wis. 439, 190 N. W. 93 (1922). See, apparently contra, *State Bank of Alcester v. Weeks*, 45 S. D. 639, 189 N. W. 941 (1922).

The extent of the authority and power possessed by a wife to charge her husband, in so far as it presents a question of agency rather than of status, depends on the content of the husband's representation, involved in the marital relation and thereby made to third persons, as to his wife's authority.

"The marital relation alone raises no presumption of agency between husband and wife, but the existence of the relation is a circumstance, with others, tending to show agency, and it has been held that slight evidence of agency is sufficient." Preston, J., in *Goodman v. Delfs*, 193 Iowa, 1183, 188 N. W. 809, at page 813 (1922); *Mounts v. Boardman Co.*, 79 Okl. 90, 191 Pac. 362 (1920); *Lonnqvist v. Lammi*, 242 Mass. 574, 136 N. E. 610 (1922); *Chadwick v. Wiggin*, 95 Vt. 515, 116 Atl. 74 (1922). This topic is discussed and cases collated in 3 Col. Law Rev. 589, 22 Harv. Law Rev. 56, and 15 Mich. Law Rev. 521.

must flow from his own act or conduct.<sup>25</sup> Where A.'s act does not actually conform to the represented authority, may P. still be bound?

Many jurisdictions have held that in such a case the person dealing with the agent must ascertain, at his peril, the reality of the conformity, and may not, in any case, rely upon the representation of the agent that his act does conform.<sup>26</sup> A different rule, however, obtains in some jur-

<sup>25</sup> "Where an agent was appointed by resolution expressed by words in *præsenti*, but intended not to take effect till certain stages of the business were completed, the agent could not bind the company by holding himself out as agent to one who relied merely upon his representations without knowledge of the resolution." Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355 (1890); Law v. Stokes, 32 N. J. Law, 249, at page 252, 90 Am. Dec. 655 (1867); Wierman v. Sugar Co., 142 Mich. 422, at page 438, 106 N. W. 75 (1905); Taylor v. Sartorius, 130 Mo. App. 23, at page 34, 108 S. W. 1089 (1908); Joseph v. Platt, 130 App. Div. 478, 114 N. Y. Supp. 1065 (1909); Quint v. O'Connell, 89 Conn. 353, 94 Atl. 288 (1915); BRUTINEL v. NYGREN, 17 Ariz. 491, 154 Pac. 1042, L. R. A. 1918F, 713; Powell, Cas. Agency, 33 (1916); Pfaltz & Bauer, Inc., v. Wiener, 181 App. Div. 793, 169 N. Y. Supp. 223 (1918).

<sup>26</sup> Attwood v. Munnings, 7 B. & C. 278, 108 Rep. 727 (1827); Grant v. Norway, 10 C. B. 665, 138 Rep. 263 (1851); Coleman v. Riches, 16 C. B. 104, 139 Rep. 695 (1855); Cox v. Bruce, 18 Q. B. D. 147 (1886); Whitechurch, Limited, v. Cavanagh, [1902] A. C. 117 (affirming Grant v. Norway strongly). But compare Young v. David Payne & Co., Limited, [1904] 2 Ch. D. 608, and LLOYD v. GRACE, SMITH & CO., [1912] A. C. 716, Powell, Cas. Agency, 102.

American jurisdictions have agreed. MUSSEY v. BEECHER, 57 Mass. (3 Cush.) 511, Powell, Cas. Agency, 40 (1849); Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998 (1881); Friedlander v. Railway Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991 (1889); National Bank of Commerce v. Railroad Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566 (1890), good collection of authorities.

Frequently the representation from P. to T. is held to be restricted, and hence that not even apparent conformity to A.'s represented authority exists, because of a limitation placed upon A.'s authority by (1) the charter of the P. corporation, N. A. Berwin & Co. v. Hewitt Realty Co., 199 App. Div. 453, 191 N. Y. Supp. 817 (1922); or (2) the by-laws of the P. corporation. This is the Pennsylvania rule. Putnam v. Ensign Oil Co., 272 Pa. 301, 116 Atl. 285 (1922). But the general rule is contra as to by-laws. Uline Loan Co. v. Standard Oil Co., 45 S. D. 81, 185 N. W. 1012 (1921); JOHN-

dictions,<sup>27</sup> where it is held that, when the power of the agent to bind the principal depends upon some fact outside the representation made by P. to T., which fact is peculiarly within the agent's knowledge,<sup>28</sup> the principal is bound by the agent's representation, although it may be false, as to the existence of such fact. Thus a railroad freight agent has no authority to issue a bill of lading for goods not received, but the railroad company, by placing him in that position, has represented to the world that A. has power to bind P. by issuing bills of lading for goods actually received. If A. issues a bill of lading for goods which he did not receive, there is no real conformity between A.'s act and P.'s representation to T., but A., by issuing the bill of lading, has represented to the world that he received the goods, and this is a fact extrinsic to the representation made by P. to T. as to A.'s power, which is peculiarly within the agent's knowledge. The rule that P. is bound in contract under such a set of facts has been embodied in the Uniform Bill of Lading Act,<sup>29</sup> and now controls in

STON v. MILWAUKEE & WYOMING INVESTMENT CO., 46 Neb. 480, at page 489, 64 N. W. 1100, Powell, Cas. Agency, 26 (1895). Contra, also, as to limitations on A.'s authority contained in a declaration of trust creating the entity for which A. is acting. Morehead v. Greenville Exchange Nat. Bank, 243 S. W. 546 (Tex. Civ. App. 1922).

<sup>27</sup> North River Bank v. Aymar, 3 Hill, 262 (N. Y. 1842); Armour v. Michigan Central R. Co., 65 N. Y. 111, 22 Am. Rep. 603 (1875) BANK OF BATAVIA v. N. Y., L. E. & W. RY. CO., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440, Powell, Cas. Agency, 43 (1887); Edwards v. Thomas, 66 Mo. 468 (1877); Wichita Sav. Bank v. Railroad Co., 20 Kan. 519 (1878); Sioux City & P. R. Co. v. Bank, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488 (1880); Brooke v. Railroad Co., 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235 (1885). On subject generally, see 7 Col. Law Rev. 616, and on the subject in Missouri, see 20 Col. Law Rev. 492.

<sup>28</sup> Stainback v. Read & Co., 52 Va. (11 Grat.) 281, at page 288, 62 Am. Dec. 648 (1854).

<sup>29</sup> "If a bill of lading has been issued by a carrier or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to: (a) The consignee named in a nonnegotiable bill; or (b)

most jurisdictions.<sup>30</sup> The same sort of question is presented as to warehouse receipts,<sup>31</sup> the certification of a check by a cashier when the bank has insufficient funds of the maker,<sup>32</sup> the issuance of a certificate of deposit,<sup>33</sup> notes made by an agent under a power of attorney restricted by implication of law to the doing of acts for the benefit of the principal,<sup>34</sup> and the issuance of stock certificates by the transfer officer of a corporation.<sup>35</sup> The liability of P. in these types of cases increases the safety with which third persons can deal with agents, and hence might seem to facilitate business. It must, however, be admitted that it

the holder of a negotiable bill, who has given value in good faith relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier or a connecting carrier of all or part of the goods, or their failure to correspond with the description thereof in the bill at the time of their issue." Section 23, Uniform Bill of Lading Act.

<sup>30</sup> Alaska, 1913; Arizona, 1921; California, 1919; Connecticut, 1911; Idaho, 1915; Illinois, 1911; Iowa, 1911; Louisiana, 1912; Maine, 1917; Maryland, 1910; Massachusetts, 1910; Michigan, 1911; Minnesota, 1917; Missouri, 1917; New Hampshire, 1917; New Jersey, 1913; New York, 1911; North Carolina, 1919; Ohio, 1911; Pennsylvania, 1911; Philippine Islands, 1911; Rhode Island, 1914; United States, 1916; Vermont, 1915; Washington, 1915; Wisconsin, 1917.

<sup>31</sup> Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380 (1862); Fletcher v. Great Western Elevator Co., 12 S. D. 643, 82 N. W. 184 (1900). Contra: Rosenberg v. National Dock & Storage Co., 218 Mass. 518, 106 N. E. 171 (1914) and comment thereon in 28 Harv. Law Rev. 336.

<sup>32</sup> Farmers' Bank v. Drovers' Bank, 16 N. Y. 125, 69 Am. Dec. 678 (1857); Meads v. Bank, 25 N. Y. 143, 82 Am. Dec. 331 (1862); Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, at page 646, 19 L. Ed. 1008 (U. S. 1871).

<sup>33</sup> Barnes v. Ontario Bank, 19 N. Y. 152 (1859).

<sup>34</sup> North River Bank v. Aymar, 3 Hill. 262 (N. Y. 1842).

<sup>35</sup> N. Y., N. H. & H. R. Co. v. Schuyler, 34 N. Y. 30 (1865); American Exch. Nat. Bank v. Woodlawn Cemetery, 120 App. Div. 119, 103 N. Y. Supp. 305 (1907), reversed in 194 N. Y. 116, 87 N. E. 107 (1909). The latter case distinguished its facts from those of the Schuyler Case, and while the distinction is plausible it seems to indicate an intent to limit in New York the application of the doctrine there set forth. Contra: Gibraltar Realty Co. v. Security Trust Co., 136 N. E. 636 (Ind. Sup. 1922).

increases the hazard of P. in acting through an agent, and it does involve a violation of a very generally accepted rule that an agent cannot by his own conduct establish the fact of agency or enlarge the scope of his authority.<sup>36</sup> Such violation should not prevent the adoption of a rule which actually facilitates the transaction of business.

### SPECIAL INSTRUCTIONS

18. The binding force of special instructions does not differ in cases of "general" and "special" agents. Special instructions given by P. to A. in no way limit A.'s power to bind P. to T., except in a case under the third P. A. T. rule, in which the instructions are capable of communication.

The significance of special instructions given to an agent by P. has caused much judicial comment. It has been said that the power of an agent to bind his principal by acts not really authorized is confined to general agents.<sup>37</sup> Such

<sup>36</sup> Oberne v. Burke, 30 Neb. 581, 46 N. W. 838 (1890); Ryle v. Manchester Bldg. & Loan Ass'n, 74 N. J. Law, 840, 67 Atl. 87 (1907); Coe v. Kutinsky et al., 82 Conn. 685, 74 Atl. 1065 (1910); Kroll v. Philadelphia, 240 Pa. 131, 87 Atl. 292 (1913). See section 105, infra.

<sup>37</sup> "They were instructed that, in case of special agency, one who deals with the agent must inquire into the extent of his authority, but that a principal is bound by all that his general agent has done within the scope of the business in which he was employed, and this, although the agent may have violated special or secret instructions given him, but not disclosed to the party with whom the agent deals. Surely this was correct." Butler v. Maples, 9 Wall. 766, at page 776, 19 L. Ed. 822 (U. S. 1869).

Excellent collection of authorities in 5 Mich. Law Rev. 665. Munn v. Commission Co., 15 Johns. 44, 8 Am. Dec. 219 (N. Y. 1818); Rossiter v. Rossiter, 8 Wend. 494, at page 497, 24 Am. Dec. 62 (N. Y. 1832); Lobdell v. Baker, 42 Mass. (1 Metc.) 193, 35 Am. Dec. 358 (1840); Williams v. Getty, 31 Pa. 461, 72 Am. Dec. 757 (1858); Day-light Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45 (1871); Cruzan v. Smith, 41 Ind. 288 (1872); Blackwell v. Ketcham, 53 Ind. 184 (1876); Montgomery Furniture Co. v. Hardaway, 104 Ala. 100, at page 115, 16 South. 29 (1893).

cases say that the authority of a "special agent" must be strictly pursued, and that if he exceeds his limited authority the principal is not bound.<sup>38</sup> Such decisions presuppose a possible division of agents into "general agents" and "special agents," and great labor has been expended upon an attempt to define these terms. For purposes of logical completeness, some have stated that agents, in respect to the extent of their authority, are to be divided into "universal," "general," and "special" agents.<sup>39</sup> Story mentions universal agents only to say that such an agency "must be of the very rarest occurrence."<sup>40</sup> No case is known to the author where an agent has been held to have power to do all acts within the legal power of the principal and which he may lawfully delegate the power to another to do. Therefore we shall not further discuss universal agents. It is submitted that the attempted division of agents into general agents and special agents is meaningless and confusing. It is usually said that a general agent is one authorized to transact the business generally of his principal, or the business of his principal of a particular kind, or the business of his principal in a particular place.<sup>41</sup> Those who thus define "general agent" say that a special agent is one given power to do individual acts only.<sup>42</sup> Other courts apply the term "general agent" to any professional or customary agent,

<sup>38</sup> See cases in next preceding footnote and *Williams v. Kerrick*, 105 Minn. 254, 116 N. W. 1026 (1908); *Rhode v. Gallat*, 70 Fla. 536, 70 South. 471 (1916), very extreme application of rule.

<sup>39</sup> Story, *Agency*, § 21; 31 Cyc. 1206.

<sup>40</sup> Story, *Agency*, § 21. See, also, *Mechem, Agency* (1914 Ed.) p. 519.

<sup>41</sup> Wait, *Law and Practice*, 215; *First Nat. Bank v. Nelson*, 38 Ga. 391, 95 Am. Dec. 400 (1868); *Cruzan v. Smith*, 41 Ind. 288 (1872); *Union Stockyard Co. v. Mallory*, 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341 (1895); *British & American Mfg. Co. v. Cody*, 135 Ala. 622, 33 South. 832 (1902); *Little v. Threshing Machine Co.*, 166 Iowa, 651, 147 N. W. 872 (1914).

<sup>42</sup> Wait, *Law and Practice*, 215, and cases cited in footnote 41, p. 50, *supra*; section 3072, *Mont. Civil Code*; *Scherer v. P. O. Ass'n*, 91 N. J. Law, 666, 103 Atl. 202 (1918).

such as an attorney, broker, factor, or auctioneer, although he may be employed only in a single transaction.<sup>43</sup> It is now quite frequently admitted that the distinction is unsatisfactory and lacking in precision.<sup>44</sup> What the courts are seeking to do is to point out that some agents have more power to bind their principals than other agents. This is true. But the determination of that power, in a given case, does not turn upon whether A. was a general or special agent, but rather upon whether the act of A. was within or without the authority or power conferred by P. upon A. in his dealings with others. If the act of A. is within that authority or power, P. is bound, regardless of what special instructions P. may have given A.<sup>45</sup>

<sup>43</sup> Paley, *Agency* (Lloyd's Ed.) 199, note; Evans, *Agency*, 102; Bowstead, *Dig. Ag.* (1919 Ed.) art. 1; *Lobdell v. Baker*, 42 Mass. (1 Metc.) 193, 35 Am. Dec. 358 (1840); *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78 (1870); *Bell v. Offutt*, 73 Ky. (10 Bush) 632 (1875).

<sup>44</sup> *Mechanics' Bank v. N. Y. & N. H. R. Co.*, 13 N. Y. 599 (1856); *HASKELL v. STARBOARD*, 152 Mass. 117, 142 N. E. 695, 23 Am. St. Rep. 812, Powell, *Cas. Agency*, 98 (1890); *Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Colo. App. 223, 51 Pac. 174 (1897); *BRUTINEL v. NYGREN*, 17 Ariz. 491, at page 498, 154 Pac. 1042, L. R. A. 1918F, 713, Powell, *Cas. Agency*, 33 (1916).

<sup>45</sup> "Whether the authority be general or limited, the servant [agent] cannot charge the master [principal] if he exceeds it. He is, of course, more likely to transcend the bounds of a narrow than of an extended power, but the principle in either case is the same." *Cross v. Atchison, T. & S. F. R. Co.*, 141 Mo. 132, at page 147, 42 S. W. 679 (1897).

"Every agency carries with it, or includes in it, the authority to do whatever is usual and necessary to carry into effect the principal power, and the principal cannot restrict his liability for acts of the agent within the apparent scope of his authority by private instructions, not communicated to those with whom he deals. These principles apply as well to special as to general agents." Mitchell, J., in *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840 (1897). See, also, *City of Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276 (1864); *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78 (1869); *Fatman v. Leet*, 41 Ind. 133, at page 140 (1872); *Adams Express Co. v. Schlessinger*, 75 Pa. 246, at page 256 (1874); *Brooke v. Railroad Co.*, 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235 (1885); *Thompson v. Mich. Mut. L. Ins. Co.*, 56 Ind. App. 502, 105 N. E. 780 (1914); *Danforth v. Chandler*, 237 Mass. 518, 130 N. E. 105 (1921); *Hage v. E. L. Wellman & Co.*,

In cases coming under the third P. A. T. rule,<sup>46</sup> it is necessary to differentiate between instructions which are communicable by A. to T. and those which could not be so communicated without lessening A.'s efficiency as P.'s representative.<sup>47</sup> "No man is at liberty to send another into the market to buy or sell for him as agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal, and then, when his agent has deviated from these instructions, to say that he was a special agent, that the instructions were limitations upon his authority, and that those with whom he dealt in the matter of the agency acted at their peril, because they were bound to inquire, where inquiry would have been fruitless, and to ascertain that of which they were not to have knowledge."<sup>48</sup>

Thus instructions given by P. to A. and unknown to T. are ineffective as limitations upon A.'s power, when either inconsistent with P.'s representations to T. as to A.'s authority,<sup>49</sup> or of such a nature that they cannot be communicated by A. to T.<sup>50</sup>

217 Mich. 537, 187 N. W. 404 (1922); *Strickland v. S. H. Kress & Co.*, 183 N. C. 534, 112 S. E. 30 (1922); *Screw Machine Products Corp. v. Cutter & Wood Supply Co.*, 44 R. I. 409, 117 Atl. 659 (1922); *Heckel v. Cranford Country Club*, 117 Atl. 607 (N. J. Err. & App. 1922); *MITCHELL v. CANADIAN REALTY CO.*, 121 Me. 512, 118 Atl. 373, Powell, Cas. Agency, 46 (1922).

<sup>46</sup> *Supra*, section 16.

<sup>47</sup> *Hatch v. Taylor*, 10 N. H. 538 (1840); *TOWLE v. LEAVITT*, 23 N. H. 360, at page 374, 55 Am. Dec. 195, Powell, Cas. Agency, 47 (1851); *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822 (U. S. 1870); *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808, *semble* (1888).

<sup>48</sup> *Hatch v. Taylor*, 10 N. H. 538 (1840).

If communicable, P. is not bound. *King v. Sparks*, 77 Ga. 285, 1 S. E. 266, 4 Am. St. Rep. 85 (1886).

<sup>49</sup> *Lobdell v. Baker*, 42 Mass. (1 Metc.) 193, 35 Am. Dec. 358 (1840); *Markey v. Mutual Benefit Life Ins. Co.*, 103 Mass. 78, at page 92 (1869); *Fatman v. Leet*, 41 Ind. 133 (1872); *Ruggles v. American Central Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674 (1889);

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<sup>50</sup> See cases in footnote 47, p. 52, *supra*.

**NOTICE TO T. OF LIMITATIONS ON A.'S AUTHORITY**

19. A.'s power to bind P. to T. is limited by any restrictions on A.'s authority which are known to T.

Since the whole doctrine of an agent's power to bind his principal by acts in excess of his actual authority is a product of the desire to facilitate the transaction of business by giving reasonable safety to third persons who deal through agents, it follows that, if a third person has notice of limitations on an agent's authority, he cannot gain rights against the principal by an act of the agent which exceeds the known limitations.<sup>51</sup> Actual knowledge of the limitations is not essential; it is enough that T. has notice, actual or constructive.<sup>52</sup> Notice exists when T. has knowledge of circumstances sufficient to put him, as a reasonable man upon inquiry, which, if pursued, would lead to knowl-

Baker v. Barnett Prod. Co., 113 Mich. 533, 71 N. W. 866 (1897); Allen Gravel Co. v. Nix, 129 Miss. 809, 93 South. 244 (1922); Howison v. Nicholson, 18 Ala. App. 504, 93 South. 373 (1922).

<sup>51</sup> Stainback v. Read & Co., 52 Va. (11 Grat.) 281, 62 Am. Dec. 648 (1854); Peabody v. Hoard, 46 Ill. 242 (1867); Stewart v. Woodward, 50 Vt. 78, 28 Am. Rep. 488 (1877); Hurley v. Watson, 68 Mich. 531, 36 N. W. 726 (1888); Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. 742, 30 C. C. A. 409 (1898); Taylor v. Sartorius, 130 Mo. App. 23, 108 S. W. 1089 (1908); Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, at page 374, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029 (1913); Mass. Mut. Life Ins. Co. v. Crenshaw, 186 Ala. 460, at page 471, 65 South. 65 (1914); Portland v. American Surety Co., 79 Or. 38, 153 Pac. 786, 154 Pac. 121 (1915); Farmers' Market v. Austin, 118 Wash. 103, 203 Pac. 42 (1921); Gold Fork Lumber Co. v. Sweany & Smith Co., 35 Idaho, 226, 205 Pac. 554 (1922); Grady v. Pink Hill Bank & Trust Co., 184 N. C. 158, 113 S. E. 667 (1922); Hawthorn Coal Corp. v. Blair, 134 Va. 44, 113 S. E. 742 (1922).

<sup>52</sup> Howard v. Braithwaite, 1 Ves. & B. 202, 209, 35 Rep. 79 (1812); Collen v. Gardner, 21 Beav. 540, 52 Rep. 968 (1856); Markey v. Mutual Benefit Life Ins. Co., 103 Mass. 78, at page 93 (1869); Apostoloff v. Levy, 186 App. Div. 767, 174 N. Y. Supp. 828 (1919), and comments thereon in 19 Col. Law Rev. 339; Virginian Ry. Co. v. Stoke, 134 Va. 186, 113 S. E. 704 (1922). See, also, 8 Mich. Law Rev. 74.

edge of the limitations.<sup>53</sup> Such notice would arise from a previous course of dealing between the parties, indicating unusual limitations. So, if T. has knowledge that A.'s authority is conferred by a power of attorney or other written instrument, he will be charged with knowledge of the restrictions upon A.'s authority contained in the instrument.<sup>54</sup> And if the act which the agent assumes to do is one for which the law requires authority in writing, or under seal, or of record, the person dealing with the agent will be charged with constructive notice of the conditions and limitations of the authority.<sup>55</sup>

## AUTHORITY AND POWER OF A PUBLIC AGENT

### 20. The act of a public agent in violation of special instructions does not usually bind his principal.

The principle last discussed accounts, in part, for the rule that an act of a public agent in violation of special instructions does not bind his principal.<sup>56</sup> The powers and duties of public agents are defined and limited by public law, of which persons dealing with such agents are charged with notice.<sup>57</sup> The rule, however, is applied more broadly than could be thus explained. It has been urged

<sup>53</sup> *Gilbert v. Deshon*, 107 N. Y. 324, 14 N. E. 318 (1887); *Brown v. West*, 69 Vt. 440, 38 Atl. 87 (1897).

<sup>54</sup> *Stainback v. Read*, 52 Va. (11 Grat.) 281, 62 Am. Dec. 648 (1854); *Frahm v. Metcalf*, 75 Neb. 241, 106 N. W. 227, 13 Ann. Cas. 312 (1905); *Thompson v. Power Co.*, 154 N. C. 13, 69 S. E. 756 (1910).

<sup>55</sup> *Backman v. Charlestown*, 42 N. H. 125 (1860). A. was a town officer, whose duties were defined in a resolution which the statute required to be recorded. *Lewis v. Commissioners*, 12 Kan. 186 (1873). A.'s authority depended upon the validity of a bond issue, which depended in turn upon the holding of a valid election, the facts as to which were matters of public record.

<sup>56</sup> *Lee v. Munroe*, 7 Cranch, 366, 3 L. Ed. 373 (U. S. 1813); *Delafield v. State of Illinois*, 26 Wend. 192 (N. Y. 1841); *Whiteside v. United States*, 93 U. S. 247, 23 L. Ed. 882 (1876).

<sup>57</sup> *Backman v. Charlestown*, 42 N. H. 125 (1860); *Mayor of Baltimore v. Eschbach*, 18 Md. 276, at page 282 (1861).

that "it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public."<sup>58</sup>

### SIGNIFICANCE OF MANNER IN WHICH A. EXERCISES HIS AUTHORITY OR POWER

**21. Authority or power to bind P. to T., possessed by A., may fail to have that legal consequence because of the manner in which A. acts.**

Having discussed the considerations determining A.'s authority and power to make a given contract which will bind P., it is still necessary to inquire whether the manner in which A. has acted is a good exercise of the authority or power determined to exist. Where the agent, acting within his authority or power, makes a contract in the name of his principal, the principal, and he alone, is bound.<sup>59</sup> It does not follow, however, that the principal is not bound because the contract is made in the name of the agent; for an undisclosed principal is frequently liable on a contract of his agent,<sup>60</sup> and, even though the identity of

<sup>58</sup> Whiteside v. United States, 93 U. S. 247, at page 257, 23 L. Ed. 882 (1876).

<sup>59</sup> Johnson v. Ogilby, 3 P. Wms. 277, 24 Rep. 1064 (1734); Robins v. Bridge, 3 M. & W. 114, 150 Rep. 1079 (1837); Judson v. Gray, 11 N. Y. 408, at page 411 (1854); Hawkins v. Dorst Co., 186 Ind. 430, 116 N. E. 577 (1917); Farr v. Stein, 54 Mont. 529, 172 Pac. 135 (1918).

If A. is acting for a foreign principal, some courts apply a different rule. Kirkpatrick v. Stainer, 22 Wend. 244 (N. Y. 1839), excellent collection of authorities: Mahony v. Kekule, 14 C. B. 390, 139 Rep. 161 (1854); Green v. Kopke, 18 C. B. 549, 139 Rep. 1484 (1856); Bray v. Kettell, 83 Mass. (1 Allen) 80 (1861); WHITNEY v. WYMAN, 101 U. S. 392, 25 L. Ed. 1050, Powell, Cas. Agency, 300 (1880). See, also, section 127, infra.

See application of like principle to fix liability on agent acting for an unlicensed foreign corporation. Ryerson & Son v. Shaw, 277 Ill. 524, 115 N. E. 650 (1917).

<sup>60</sup> See section 91, infra.

the principal is known, he may become bound on a contract made in the name of the agent, if such was the intention of the parties.<sup>61</sup> An agent, therefore, may so contract that he binds P. alone, or so that he binds himself alone, or so that he gives to T. an option to hold either P. or A. The considerations determining which of these three legal consequences shall flow from the acts of the agent are treated hereafter.<sup>62</sup>

### AGENCY FROM NECESSITY

22. In certain legal relations, under circumstances of necessity peculiar to the particular relation, the law confers upon one party thereto power to make contracts which are binding upon the other, without his authority, and in some cases against his will. Such is the power of a wife, and in some jurisdictions of a child, in case of nonsupport, to pledge the credit of the husband or father for necessaries, and the power of a railway servant in some jurisdictions, in case of accident and emergency, to employ a surgeon on behalf of the railway company for an injured employé. In such cases it is frequently said that the law creates an agency from necessity.

#### *In General*

The term "agency from necessity" is sometimes used to describe relations which, accurately speaking, are not referable to the law of agency. Such is the relation between husband and wife, considered in the next paragraph, by which, but under particular circumstances only, the wife has the power to impose an obligation upon her husband, even against his will, in favor of a third person. The term "agency from necessity," as applied to such a rela-

<sup>61</sup> See sections 124-126, infra.

<sup>62</sup> See sections 118-128, infra.

tion, is inaccurate, because the foundation of the obligation is not to be sought in any principle of agency, and it is misleading, because necessity alone is never the foundation of agency. It is true that the ordinary powers of an agent are sometimes enlarged by the occurrence of an emergency which justifies action that would otherwise be a departure from or in excess of the authority conferred; but such extraordinary authority is to be implied from the conduct of the principal in creating an agency in which such an emergency may arise, and is hence derived from the will of the principal. In cases where a so-called agency arises, independently of agreement, by operation of law, the relation may be described as agency quasi ex contractu.<sup>63</sup> In other words, the relation is not one of agency, which rests essentially upon agreement, but the obligation of the so-called principal is enforced as if an agreement actually existed. Thus, in an action against a husband to recover for necessaries furnished to his wife under the circumstances mentioned in the next paragraph, the form of action is assumpsit, and the husband's request, although alleged, need not be proved.<sup>64</sup>

#### *Agency of Wife*

A husband is bound to maintain his wife and to supply her with necessaries suitable to her situation and his own condition in life, and if he fails in this duty the law gives her the right to pledge his credit for the purpose of supplying herself.<sup>65</sup> This right to contract debts on his credit is strictly limited to the conditions which create it, and the husband cannot be charged at the suit of one who has

<sup>63</sup> Anson, Contr. (1919 Ed.) 444.

<sup>64</sup> Benjamin v. Dockham, 134 Mass. 418 (1883).

<sup>65</sup> Johnston v. Sumner, 3 H. & N. 261, 157 Rep. 469 (1858); Cromwell v. Benjamin, 41 Barb. 558 (N. Y. 1863); Woodward v. Barnes, 43 Vt. 330 (1871); Pierpont v. Wilson, 49 Conn. 450 (1881); Watkins v. De Armond, 89 Ind. 553 (1883); Prescott v. Webster, 175 Mass. 316, 56 N. E. 577 (1900); Wanamaker v. Weaver, 176 N. Y. 75, 68 N. E. 135, 65 L. R. A. 529, 98 Am. St. Rep. 621 (1903), and comment thereon 3 Col. Law Rev. 589.

assumed to deal with the wife, under such circumstances, without proof that the husband failed to provide suitable support, and that the articles furnished were necessaries. But, if these facts are proved, the husband's liability is established notwithstanding that he may have forbidden his wife to pledge his credit, or forbidden the other party to deal with her. The husband's obligation is thus one of quasi contract, and is quite distinct from that which arises when he has expressly or by implication conferred authority upon his wife.<sup>66</sup> It is frequently said that under such circumstances the law creates an agency from necessity,<sup>67</sup> or a compulsory agency;<sup>68</sup> but it is apparent that the real foundation of liability is the duty of support, and the treatment of the subject in detail belongs rather to the law of husband and wife than of agency.<sup>69</sup>

#### *Agency of Child*

It is very generally held that a father is under no legal obligation to support his minor child, and where this rule prevails the child has no right to pledge his father's credit, even for necessities, without express or implied authority.<sup>70</sup> But in some states a contrary rule prevails, and where the father fails in his duty of support the child has a right, upon his father's credit, to supply himself with

<sup>66</sup> See footnote 24, p. 45, *supra*.

<sup>67</sup> *Johnston v. Sumner*, 3 H. & N. 261, 157 Rep. 469 (1858), and other cases cited in footnote 65, p. 77, *supra*.

<sup>68</sup> *Benjamin v. Dockham*, 134 Mass. 418 (1883).

<sup>69</sup> See *Keener, Quasi Contr.* 22; *Bergh v. Warner*, 47 Minn. 250, 252, 50 N. W. 77, 28 Am. St. Rep. 362 (1891).

It is also his duty to bury his wife, and if he neglects it he is liable for reasonable funeral expenses incurred by another. *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670 (1868); *Gleason v. Warner*, 78 Minn. 405, 81 N. W. 206 (1899).

A husband is liable for necessities supplied to his wife while he is insane. *Read v. Legard*, 6 Ex. 636, 155 Rep. 698 (1851). Or while she is unconscious. *Cunningham v. Reardon*, *supra*, per Hoar, J.

<sup>70</sup> *Mortimore v. Wright*, 6 M. & W. 482, 151 Rep. 502 (1840); *Gordon v. Potter*, 17 Vt. 348 (1845); *Kelley v. Davis*, 49 N. H. 187, 6 Am. Rep. 499 (1870); *Carney v. Barrett*, 4 Or. 171 (1871); *McMillen*

necessaries.<sup>71</sup> The same considerations, applicable to the so-called agency from necessity between husband and wife, apply also to this relation.

*Agency of Shipmaster*

The master of a ship is invested with certain extraordinary powers, to be exercised only in cases of extreme emergency. He may, for example, where it is necessary for the prosecution of the voyage, borrow money on the credit of the shipowner,<sup>72</sup> or hypothecate the ship or cargo,<sup>73</sup> or sell part of the cargo,<sup>74</sup> and he may, in case of absolute necessity, sell both ship and cargo.<sup>75</sup> To justify such action the necessity must be established, and it must appear that it was impracticable to communicate with the respective owners. Ordinarily the authority of the master over the cargo is limited to transportation and preservation. "But he may," says Story, "under circumstances of great emergency, acquire a superinduced authority to dispose of it, from the very nature and necessity of the case. \* \* \*

v. Lee, 78 Ill. 443 (1875); Rogers v. Turner, 59 Mo. 118 (1875); Freeman v. Robinson, 38 N. J. Law, 383, 20 Am. Rep. 399 (1876).

<sup>71</sup> Stanton v. Willson, 3 Day, 37, 3 Am. Dec. 255 (Conn. 1808); Cromwell v. Benjamin, 41 Barb. 558 (N. Y. 1863); Watkins v. De Armond, 89 Ind. 553 (1883); Gilley v. Gilley, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307 (1887).

<sup>72</sup> Johns v. Simons, 2 Q. B. 425, 114 Rep. 168 (1842); Beldon v. Campbell, 6 Ex. 886, 155 Rep. 805 (1851); Stearns v. Doe, 78 Mass. (12 Gray) 482, 74 Am. Dec. 608 (1859); McCready v. Thorn, 51 N. Y. 454 (1873).

<sup>73</sup> The Gratitudine, 3 Rob. Adm. 240, 165 Rep. 450 (1801); United Ins. Co. v. Scott, 1 Johns. 106 (N. Y. 1806); The Packet, 3 Mason, 255, Fed. Cas. No. 10,654 (U. S. 1823); Pratt v. Reed, 19 How. 359, 361, 15 L. Ed. 660 (U. S. 1860); The Hamburg, Br. & Lush. 253 (1864); Kleinwort v. Cassa Marittima of Genoa, 2 App. Cas. 156 (1877).

<sup>74</sup> The Gratitudine, 3 Rob. Adm. 240, 165 Rep. 450 (1801); Jordan v. Insurance Co., 1 Story, 342, Fed. Cas. No. 7,524 (U. S. 1840); Pope v. Nickerson, 3 Story, 465, Fed. Cas. No. 11,274 (U. S. 1844); Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248 (1854); Australasian Steam Nav. Co. v. Morse, L. R. 4 P. C. 222 (1872).

<sup>75</sup> Ireland v. Thomson, 4 C. B. 149, 136 Rep. 460 (1847); Story, Agency, § 118.

The character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law."<sup>76</sup> In view of the likelihood of the occurrence of emergencies in the course of a voyage, when communication is impossible, it would seem not unreasonable to imply from the conduct of the owners, even of the cargo, in committing their property to the care of the shipmaster, authority to act as the necessities of the case may require with regard to the interest of all concerned, and thus to rest the authority of the agent upon the implied appointment of the principal.<sup>77</sup> But, whatever the source from which the extraordinary authority of the shipmaster is derived, it is peculiar to the character of his office, and affords no precedent in ordinary cases of agency.<sup>78</sup>

*Agency of Railway Servant to Employ Surgeon*

An anomalous doctrine has in recent years become established in some jurisdictions, by which railway conductors, station agents, and other railway servants are deemed to be vested with authority in cases of accident to employ, on behalf of the railway company, surgeons, and physicians, when their services are necessary to prevent resulting loss of life or great bodily harm to injured employés.<sup>79</sup> This authority is held to be independent of ex-

<sup>76</sup> Story, *Agency*, § 118.

<sup>77</sup> "The character of agent of the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone. In the circumstances supposed something must be done, and there is nobody present who has authority to decide what is to be done. The master is invested by presumption of law with authority to give directions on this ground that the owners have no means of expressing their wishes. But when such means exist, when communication can be made to the owners, and they can give their own orders, the character of agent is not imposed upon the master, because the necessity does not arise." *The Hamburg, Br. & Lush.* 253 (1864).

<sup>78</sup> *Hawtayne v. Bourne*, 7 M. & W. 595, 151 Rep. 905 (1841).

<sup>79</sup> *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458 (1877); *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752 (1884); *Arkansas S. R. Co. v. Loughridge*, 65 Ark. 300, 45 S. W. 907 (1898).

press or implied appointment, and to be conferred by law, by reason of the pressing necessity, upon the highest railway official present when the necessity arises. The authority is limited to the necessity, and terminates when the emergency has passed.<sup>80</sup> The reason given for the rule is the absence and consequent inability to act of some one of the company's agents authorized to make such contracts for the company, but the rule presupposes the existence of a duty resting upon the company to care for injured employés under such circumstances.<sup>81</sup> The foundation of such a duty must be sought in public policy, in view of the frequent occurrence of railway accidents at places where no one who is under any obligation to care for the injured employé, unless it be the employés of the company, is likely to be present. "We think it is their (the company's) duty," said Judge Cooley,<sup>82</sup> "to have some officer or agent, at all times, competent to exercise a discretionary authority in such cases, and that, on grounds of public policy, they should not be suffered to do otherwise."

This duty to care for an injured employé is analogous to that of the husband to supply his wife with necessaries, and logically the so-called agency, resting upon a quasi

See, also, 44 Am. & Eng. R. Cas. 461, note (collecting cases). Contra: Marquette & O. R. Co. v. Taft, 28 Mich. 289, by divided court (1873); Tucker v. Railway Co., 54 Mo. 177 (1873); Cooper v. Railroad Co., 6 Hun, 276 (N. Y. 1875); Sevier v. Railroad Co., 92 Ala. 258, 9 South. 405 (1890); Hutchins Liability of R. R. Companies for Medical Services Rendered to Injured Employees and Others, 2 Mich. Law Rev. 1. See excellent collection of authorities, 28 Harv. Law Rev. 607.

<sup>80</sup> Louisville, N. A. & C. R. Co. v. Smith, 121 Ind. 353, 22 N. E. 775, 6 L. R. A. 320 (1889); St. Louis, A. & T. Ry. Co. v. Hoover, 53 Ark. 377, 13 S. W. 1092 (1890); Vandalia R. Co. v. Bryan, 60 Ind. App. 223, 110 N. E. 218 (1915), and comment thereon in 29 Harv. Law Rev. 547.

<sup>81</sup> The duty does not extend to the care of passengers. Union Pac. Ry. Co. v. Beatty, 35 Kan. 268, 10 Pac. 845, 57 Am. Rep. 160 (1886). Or trespassers. Adams v. Railway Co., 125 N. C. 565, 34 S. E. 642. See comment thereon in 13 Harv. Law Rev. 603.

<sup>82</sup> Dissenting, in Marquette & O. R. Co. v. Taft, 28 Mich. 289 (1873).

contractual obligation, would be imposed upon the company notwithstanding its express prohibition to its agents to perform the duty. Indeed, if the duty rests upon the company, it is difficult to escape from the conclusion that it would be liable to a surgeon or physician for services rendered to an injured employé, provided the necessity were established, even without the intervention of the so-called agent. Whether the doctrine is to be extended to other dangerous employments is apparently still an open question.<sup>83</sup>

<sup>83</sup> Holmes v. McAllister, 123 Mich. 493, 82 N. W. 220, 48 L. R. A. 396 (laundry); 28 Harv. Law Rev. 607; Godshaw v. Struck, 109 Ky. 285, 58 S. W. 781, 51 L. R. A. 668 (1900), and comment thereon in 1 Col. Law Rev. 122.

## CHAPTER IV

### SCOPE OF PARTICULAR AGENCIES

23. Principles Governing Ascertainment.
24. Agents to Sell Personality, Including Factors and Brokers.
25. Agents to Sell Realty.
26. Agents to Sell at Auction.
27. Agents to Purchase.
28. Agents to Collect.
29. Agents to Execute Commercial Paper.
30. Agents to Manage a Business.
31. Insurance Agents.
32. Bank Cashiers.
33. Attorneys at Law.

### PRINCIPLES GOVERNING ASCERTAINMENT

23. The scope of the agency of a private agent is determined by combining his "authority" and his "power" as determined by the rules of the two preceding chapters.

In chapter II we discussed the principles which control the conferring of actual authority by P. upon A. to bind P. to T. in contract, including a discussion of the inferences as to P.'s real intention made from the language or conduct of P. In the succeeding chapter we discovered the limits upon A.'s power to bind P. to T. in contract when A. was acting without any actual authorization from P. Many cases and some statutes designate this power of A. as his "apparent" or "ostensible" authority,<sup>1</sup> and whenever either of these phrases is used herein, it is intended thereby to refer to an act within A.'s power, but not within his authority. For the convenience of the student it has been thought desirable to collect in this chapter illustrations of the authority and power of those kinds of agents whose "scopes" are most frequently litigated.

<sup>1</sup> Cf. section 16, supra, and Comp. Laws N. D. 1913, § 6322 ff.

## AGENTS TO SELL PERSONALTY, INCLUDING FACTORS AND BROKERS

### 24. Illustrations as to the scope of agents to sell personalty, including factors and brokers.

Authority to sell personal property is in most instances conferred verbally or by informal writing, and may, of course, be inferred from the conduct of the principal. A factor is an agent whose ordinary business is to sell for commission goods with which he is intrusted with possession by his principal.<sup>2</sup> He is differentiated from a broker by the fact that a broker does not have possession of the goods.<sup>3</sup>

No authority to sell is to be inferred from the mere possession of the goods.<sup>4</sup> Intrusting another with the possession, indeed, if accompanied by other conduct of P., investing the possessed with an appearance of ownership, may confer power on the one so intrusted to pass title to a purchaser who has relied on the appearances, as where the owner has invested the person intrusted with possession with the indicia, or documentary evidence, of title.<sup>5</sup>

<sup>2</sup> Under some American statutes the term is more strictly limited, so as to be applicable only when the third person deals with such an agent in the belief that he is the owner of the goods so intrusted. See footnote 15, p. 67, *infra*.

<sup>3</sup> On the distinction between a factor and broker, see *Baring v. Corrie*, 2 B. & Ald. 137, 106 Rep. 317 (1818); *Graham v. Duckwall*, 71 Ky. (8 Bush) 12 (1871). On distinction between factor and auctioneer, see *Williams v. Millington*, 1 H. Bl. 81, 126 Rep. 49 (1788).

<sup>4</sup> *Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541 (N. Y. 1838); *Covill v. Hill*, 4 Denio, 323 (N. Y. 1847); *Cole v. Northwestern Bank*, L. R. 10 C. P. 354, at page 362 (1875); *Johnson v. Credit Lyonnais*, 2 C. P. D. 224, affirmed 3 C. P. D. 32 (1877); *Stanton v. Hawley*, 193 App. Div. 559, 184 N. Y. Supp. 415 (1920); *Richmond Guano Co. v. Du Pont*, 284 Fed. 803 (C. C. A. 1922); *Pacific Accept. Corp. v. Bank of Italy*, 59 Cal. App. 76, 209 Pac. 1024 (1922); *Overland Texarkana Co. v. Bickley*, 152 La. 622, 94 South. 138 (1922); *Carson v. Hunkins*, 210 Mo. App. 105, 242 S. W. 153 (1922); *HEDGES v. BURKE*, 147 Tenn. 247, 247 S. W. 91, *Powell, Cas. Agency*, 51 (1923).

<sup>5</sup> This conduct of P. may be such that the only reasonable infer-

Thus, where the owner sends his goods to the place of business of one whose business is to sell such goods as an agent on commission, and gives no directions what to do with them, the only reasonable inference is that he desires the goods to be sold by such agent;<sup>6</sup> but if A. is regularly engaged in selling such goods, and also in repairing them, such inference of actual authority to sell becomes less likely,<sup>7</sup> and if P. has specifically directed A. not to sell these goods, no such inference can be made,<sup>8</sup> or if P. has directed A. to do something other than sell, no such inference is made.<sup>9</sup> Thus the fact that possession is intrusted to one who is a dealer in that class of goods is not, by itself, sufficient to create either authority or power to sell, but it does have weight in connection with other circumstances indicating the existence of such power or authority.<sup>10</sup>

If the goods have been actually or apparently intrusted to A. for purposes of sale on commission, then A. is a fac-

ence from it is that P. really intended A. to sell, as in *Pickering v. Busk*, 15 East, 38, 104 Rep. 758 (1812); or it may be such that, although A. is really not intended to sell, still T. is reasonably entitled to believe that A. is so authorized. *Dyer v. Pearson*, 3 B. & C. 38, 107 Rep. 648 (1824); *Calais Steamboat Co. v. Scudder*, 2 Black, 372, 17 L. Ed. 282 (U. S. 1863); *McNeil v. Bank*, 46 N. Y. 325, 7 Am. Rep. 341 (1871); *Cole v. Northwestern Bank*, L. R. 10 C. P. 354 (1875); *Nixon v. Brown*, 57 N. H. 34 (1876); *Walker v. Railway Co.*, 47 Mich. 338, 11 N. W. 187 (1882); *Rimmer v. Webster*, [1902] 2 Ch. 163, and comment thereon in 3 Col. Law Rev. 57; *Carter v. Rowley*, 59 Cal. App. 486, 211 Pac. 267 (1922).

<sup>6</sup> *Pickering v. Busk*, 15 East, 38, 104 Rep. 758 (1812); *Heath v. Stoddard*, 91 Me. 499, 40 Atl. 547 (1898).

<sup>7</sup> *TOWLE v. LEAVITT*, 23 N. H. 360, 55 Am. Dec. 195, Powell, Cas. Agency, 47 (1851).

<sup>8</sup> *Biggs v. Evans*, [1894] 1 Q. B. 88.

<sup>9</sup> *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332 (1882), where P. directed A., a jeweler, to match a stone left with him; *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 56 N. W. 663, 48 Am. St. Rep. 400 (1893).

<sup>10</sup> *Smith v. Clews*, 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502 (1887).

tor, except in so far as this has been changed by American statutes, restricting the operation of the Factors' Acts to cases of undisclosed principal. The rights of third persons dealing with factors are now regulated, in almost every jurisdiction by statute. The American enactments upon this topic have been largely modeled upon the early English Factors' Act of 1825.<sup>11</sup> Owing to the varying provisions found in the different states, only the New York statute, which has been largely followed in other states, will be considered in detail. This act, in its original form, was enacted in 1830 following for the most part the provisions of the English act of 1825.<sup>12</sup> It provides, in section 3, that "every factor or other agent, intrusted with the possession of any bill of lading, custom house permit, or warehouseman's receipt for the delivery of any merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the

<sup>11</sup> 6 Geo. IV, c. 94.

For illustrative American statutes, see Kentucky Laws 1879-80, c. 1541; Maine, Rev. St. 1910, c. 39; Maryland Code Pub. Gen. Laws 1904, art. 2; Massachusetts, Gen. Laws 1921, c. 104; New York, Lien Law, § 182, and Personal Property Law, § 43; Ohio, Gen. Code, 1921, §§ 8358 to 8364; Pennsylvania, Pepper & Lewis' Dig. (Ed. 1896) pp. 2027-2029; Rhode Island, Gen. Laws 1909, c. 187; Wisconsin, Rev. St. 1898, §§ 3345, 3346.

For construction of Massachusetts statute, see *Stollenwerck v. Thacher*, 115 Mass. 224 (1874); *Thacher v. Moors*, 134 Mass. 156 (1883); *Prentice Co. v. Page*, 164 Mass. 276, 41 N. E. 279 (1895); *Cairns v. Page*, 165 Mass. 552, 43 N. E. 503 (1896). See, also, footnote 22, p. 68, *infra*.

<sup>12</sup> See Appendix for language of statute in its present form. See, also, *Stevens v. Wilson*, 6 Hill. 512 (N. Y. 1844); *Id.*, 3 Denio, 472 (N. Y. 1846); *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573 (1887).

whole or any part of such merchandise,<sup>13</sup> and any account receivable or other chose in action created by sale or other disposition of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof."<sup>14</sup> The words "upon the faith thereof" are to be referred to the words "shall be deemed to be the true owner thereof"; in other words, the statute does not afford protection to one who knows that he is not dealing with the true owner.<sup>15</sup> "The object of the statute was to protect innocent persons who deal in reliance upon apparent ownership, resting upon possession either of the merchandise itself or documentary evidence of ownership."<sup>16</sup> The act thus differs materially from the later English acts, in which the protection extends to those dealing with the agent, notwithstanding knowledge that he is such, provided that they are without notice that he is exceeding his authority.<sup>17</sup>

The protection of the act is extended to persons dealing with (1) a factor or other agent intrusted with the bill of lading or other document, or (2) a factor or other agent who is intrusted with the possession of the merchandise "for the purpose of sale or as security for any advances to be made or obtained thereon." Under the first branch the

<sup>13</sup> The words which follow, to the next word "merchandise," were inserted by an amendment in 1915. Laws 1915, c. 273.

<sup>14</sup> For a valuable discussion of the interpretation of this statute, see *Zachrisson v. Ahman*, 4 N. Y. Super. Ct. 68 (1848); *Bonito v. Mosquera*, 15 N. Y. Super. Ct. 401 (1858); *Cartwright v. Wilmerding*, 24 N. Y. 521 (1862); *First Nat. Bank v. Shaw*, 61 N. Y. 283 (1874).

<sup>15</sup> *Stevens v. Wilson*, 6 Hill, 512 (N. Y. 1844); *Covell v. Hill*, 6 N. Y. 374 (1852); *Howland v. Woodruff*, 60 N. Y. 73 (1875); *HEDGES v. BURKE*, 147 Tenn. 247, 247 S. W. 91, Powell, Cas. Agency, 51 (1923).

This construction was disapproved under a similar act in Wis. *Price v. Insurance Co.*, 43 Wis. 267 (1877). Cf. *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573 (1887).

<sup>16</sup> *Vann, J., in N. Y. Security & Trust Co. v. Lipman*, 157 N. Y. 551, 52 N. E. 595 (1899).

<sup>17</sup> See Factors' Act 1889, par. 2; *Navulshaw v. Brownrigg*, 1 Sim. (N. S.) 573, 61 Rep. 221 (1851); *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113 (1871).

agent must have the documentary evidence of title in his name.<sup>18</sup> This must be a bill of lading, custom house permit, or warehouse keeper's receipt;<sup>19</sup> the act thus differing from the later English acts, which have included any document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize the possessor to transfer or receive goods thereby represented.<sup>20</sup> Under the second branch the entrusting must be for the purpose of sale or obtaining advances,<sup>21</sup> here again differing from the present English act.<sup>22</sup> The possession must be actual, and not merely constructive.<sup>23</sup> In either case the possession must be "intrusted." The agent must be consciously and voluntarily intrusted, and the act has no application to a case where the document or the goods are taken by trespass or theft, and thus the possession is from the beginning wrongful.<sup>24</sup>

<sup>18</sup> *First Nat. Bank v. Shaw*, 61 N. Y. 283 (1874). It seems that the document must be intrusted for the purpose of sale, etc. *Cartwright v. Wilmerding*, 24 N. Y. 521, at page 528 (1867). Cf. *Price v. Insurance Co.*, 43 Wis. 267 (1877).

<sup>19</sup> *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843 (1890); *Royle v. Worcester Buick Co.*, 243 Mass. 143, 137 N. E. 531 (1922).

<sup>20</sup> *Factors' Act 1889*, par. 1; *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113 (1871).

<sup>21</sup> *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818 (1887).

<sup>22</sup> See *Factors' Act 1889*, par. 2, §§ 1 and 2.

The Massachusetts statute includes different cases from those thus far considered. Thus, under it, one employed on a salary to go about and sell goods put into his manual possession is a person "intrusted with merchandise and having authority to sell or consign same," within the Massachusetts statute (section 3), protecting one who receives merchandise from such person and advances money thereon in good faith, believing him to be the owner; the statute not being confined to mercantile agents. *Cairns v. Page*, 165 Mass. 552, 43 N. E. 503 (1896).

<sup>23</sup> *Bonito v. Mosquera*, 15 N. Y. Super. Ct. 401 (1858); *Howland v. Woodruff*, 60 N. Y. 73 (1875).

<sup>24</sup> *First Nat. Bank v. Shaw*, 61 N. Y. 283 (1874); *Kinsey v. Leggett*, 71 N. Y. 387 (1877); *Collins v. Ralli*, 20 Hun, 246 (1880), affirmed 85 N. Y. 637 (1881); *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843 (1890).

When the merchandise is taken in deposit as security for an antecedent debt, no greater right is acquired than was possessed and might have been enforced by the agent. The owner may demand and receive any merchandise so deposited on repayment of the money advanced, and may recover any balance in the hands of the person with whom the merchandise was deposited as the produce of its sale after satisfying the amount due him by reason of the deposit.

There are many rules covering agents intrusted with the possession of personal property for sale not covered by these Factors' Acts, especially under the American statutes. If in consideration of additional compensation he guarantees the payment of price, he is called a *del credere* agent.<sup>25</sup> Unless his authority is expressly limited, a factor has implied authority to sell the goods intrusted to him in his own name,<sup>26</sup> to sell at such times and for such prices as he thinks best,<sup>27</sup> to sell on reasonable credit,<sup>28</sup> to warrant the goods, if it is usual to warrant that class of goods,<sup>29</sup> and to receive payment.<sup>30</sup>

A factor, as such, apart from the Factors' Acts, has nei-

<sup>25</sup> See cases in footnotes 79-87, pp. 408, 409, chapter XV.

<sup>26</sup> Even if limited, the factor may have power to bind P. by such a sale. *Ex parte Dixon*, L. R. 4 Ch. D. 133 (1876).

<sup>27</sup> *Smart v. Sandars*, 3 C. B. 380, 136 Rep. 152 (1846).

<sup>28</sup> *Scott v. Surman, Willes*, 400, 125 Rep. 1235 (1742); *Houghton v. Matthews*, 7 B. & P. 485, 127 Rep. 263 (1803); *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22 (1810); *Van Alen v. Vanderpool*, 6 Johns. 69, 5 Am. Dec. 192 (N. Y. 1810); *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45 (1871); *Burton v. Goodspeed*, 69 Ill. 237 (1873); *Pinkham v. Crocker*, 77 Me. 563, 1 Atl. 827 (1885).

On a sale for credit he may take a bill or note in payment. *Goodenow v. Tyler*, supra; *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54 (1821).

<sup>29</sup> *Schuchardt v. Allen*, 1 Wall. 359, 17 L. Ed. 642 (U. S. 1863); *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169 (1872). Cf. *Argersinger v. MacNaughton*, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687 (1889).

<sup>30</sup> *Drinkwater v. Goodwin*, 1 Cowp. 251, 98 Rep. 1070 (1775); *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45 (1871).

ther the actual nor the apparent authority to delegate his authority,<sup>31</sup> to barter,<sup>32</sup> or to pledge,<sup>33</sup> unless for charges on the goods themselves.<sup>34</sup> Like other agents a factor is bound to exercise skill, care, and diligence, to exercise good faith, to account, and to obey the instructions of his principal.<sup>35</sup> He may depart from his instructions, however, if such a course is justified by the occurrence of an unforeseen emergency, or if obedience would impair his security for advances.<sup>36</sup> As between himself and third persons the principal is bound by the acts of the factor within the scope of the authority which is usually confided to such an agent, unless such third persons have notice of such instructions imposing restrictions.<sup>37</sup>

Any agent who is intrusted with the possession of goods which he is authorized to sell has actual or apparent authority to receive payment.<sup>38</sup> So a clerk employed to sell

<sup>31</sup> SALLY v. RATHBONE, 2 M. & S. 298, 105 Rep. 392, Powell, Cas. Agency, 401 (1814); Warner v. Martin, 11 How. 209, 13 L. Ed. 667 (U. S. 1850). See sections 80, 81, infra.

<sup>32</sup> Guerreiro v. Peile, 3 B. & Ald. 616 (1820); Royle v. Worcester Buick Co., 243 Mass. 143, 137 N. E. 531 (1922).

<sup>33</sup> Paterson v. Tash, Str. 1178, 93 Rep. 1110 (1743); Martini v. Coles, 1 M. & S. 140, 105 Rep. 53 (1813); Rodriguez v. Hefferman, 5 Johns. Ch. 417 (N. Y. 1821); Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196 (1861); Gray v. Agnew, 95 Ill. 315 (1880); Allen v. Bank, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573 (1887).

But, if the factor has a lien on the goods, he may pledge them to the amount of his lien. Warner v. Martin, 11 How. 209, 13 L. Ed. 667 (U. S. 1850).

<sup>34</sup> Evans v. Potter, 2 Gall. 12, Fed. Cas. No. 4,569 (U. S. 1813); Fielding v. Kymer, 2 Brod. & B. 639, 129 Rep. 1112 (1821). Contra: Boyce v. Bank, 22 Fed. 53 (C. C. 1884).

<sup>35</sup> See chapter XV, infra.

<sup>36</sup> See chapter XV, at footnote 44, p. 376.

<sup>37</sup> Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45 (1871); Ex parte Dixon, L. R. 4 Ch. D. 133 (1876).

<sup>38</sup> Meyer v. Stone, 40 Ark. 210, 55 Am. Rep. 577 (1882), dictum and discussion of cases up to 1885. Cal. Civil Code § 2325, so provides. Petersen v. Pacific American Fisheries, 108 Wash. 63, 183 Pac. 79, 8 A. L. R. 198 (1919); Goldsmith v. Barg, 191 N. Y. Supp. 330 (Sup. 1921).

over the counter has, ordinarily, authority to receive payment at the time of sale, but not afterwards.<sup>39</sup>

The agent to sell personalty, not intrusted with possession, has actual or apparent authority to fix the price, provided it is not unreasonable, and to agree upon the terms of sale provided they are usual.<sup>40</sup> Authorization to sell confers only authority or power to sell for money, and hence does not include authority or power to sell on credit,<sup>41</sup> unless there is a usage to that effect,<sup>42</sup> or to accept paper in payment,<sup>43</sup> or to exchange or barter,<sup>44</sup> or to pledge or mortgage.<sup>45</sup> Authority to sell should not be construed as authority to sell at auction.<sup>46</sup> A broker—that is, an agent not intrusted with the possession of the goods—has,

<sup>39</sup> *Kaye v. Brett*, 5 Ex. 269 (1850); *Law v. Stokes*, 32 N. J. Law, 249, at page 252, 90 Am. Dec. 655 (1867); *Hirshfield v. Waldron*, 54 Mich. 649, 20 N. W. 628 (1884).

<sup>40</sup> *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45 (1871); *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682 (1881); *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S. E. 980 (1903); *Galbraith v. Weber*, 58 Wash. 132, 107 Pac. 1050, 28 L. R. A. (N. S.) 341 (1910).

<sup>41</sup> *Delafield v. State of Illinois*, 26 Wend. 192, at page 223 (N. Y. 1841).

<sup>42</sup> *Wiltshire v. Sims*, 1 Camp. 258 (1808); *Pelham v. Hilder*, 1 Y. & C. C. C. 3 (1841); *Payne v. Potter*, 9 Iowa, 549 (1859); *Burks v. Hubbard*, 69 Ala. 379 (1881); *Davison v. Parks*, 79 N. H. 262, 108 Atl. 288 (1919).

<sup>43</sup> *Harlan v. Ely*, 68 Cal. 522, 9 Pac. 947 (1886).

<sup>44</sup> *Guerreiro v. Peile*, 3 B. & Ald. 616, 106 Rep. 786 (1820); *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795 (1862); *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611 (1863); *Taylor & Farley Organ Co. v. Starkey*, 59 N. H. 142 (1879); *Block v. Dundon*, 83 App. Div. 539, 81 N. Y. Supp. 1114 (1903); *Roberts v. Francis*, 123 Wis. 78, 100 N. W. 1076 (1904).

<sup>45</sup> *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89 (1877); *Switzer v. Wilvers*, 24 Kan. 384, 36 Am. Rep. 259 (1880); *Jonmenjoy Coondoo v. Watson*, L. R. 9 A. C. 561 (1884); *Wycoff, etc., v. Davis*, 127 Iowa, 399, 103 N. W. 349 (1905). See 20 Harv. Law Rev. 568.

<sup>46</sup> *TOWLE v. LEAVITT*, 23 N. H. 360, at page 375, 55 Am. Dec. 195, Powell, Cas. Agency, 47 (1851).

A power of attorney authorizing a public sale does not authorize a private sale. *The G. H. Montague*, 4 Blatchf. 461, Fed. Cas. No. 5,377 (1860).

as a rule, no authority to contract in his own name,<sup>47</sup> or to delegate his authority;<sup>48</sup> but, in conformity with the usage of the Stock Exchange, a stock broker has in many transactions either authority or power to buy or sell in his own name,<sup>49</sup> and to act by a substitute.<sup>50</sup> The agent has implied authority to warrant the goods, if in the sale of such goods it is usual to give warranty,<sup>51</sup> but not otherwise,<sup>52</sup> and he may not give an unusual warranty,<sup>53</sup> or war-

<sup>47</sup> Baring v. Corrie, 2 B. & Ald. 137, 106 Rep. 317 (1818); Saladin v. Mitchell, 45 Ill. 79 (1867).

<sup>48</sup> Henderson v. Barnewall, 1 Y. & J. 387, 148 Rep. 721 (1827).

The rule is confined to the employment of substitutes, and has no application to the use of subordinates. Rawls v. Carlisle & Baston. 208 Ala. 164, 93 South. 818, 820 (1922).

<sup>49</sup> Markham v. Jaudon, 41 N. Y. 235 (1869); Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102 (1893).

<sup>50</sup> Rosenstock v. Tormey, 32 Md. 169, 3 Am. Rep. 125 (1870).

<sup>51</sup> Nelson v. Cowing, 6 Hill, 336 (N. Y. 1844); Dingle v. Hare, 7 C. B. (N. S.) 145, 141 Rep. 770 (1859); Randall v. Kehlor, 60 Me. 37, 11 Am. Rep. 169 (1872); Ahern v. Goodspeed, 72 N. Y. 108 (1878); Dayton v. Hooglund, 39 Ohio St. 671 (1884); Talmage v. Bierhause, 103 Ind. 270, 2 N. E. 716 (1885); Westurn v. Page, 94 Wis. 251, 68 N. W. 1003 (1896); Case Threshing Machine Co. v. McKinnon, 82 Minn. 75, 84 N. W. 646 (1900); Reid v. Alaska Packing Co., 47 Or. 215, 83 Pac. 139 (1905); Turner Bros. v. Clarke, 143 Ga. 44, 84 S. E. 116 (1915).

<sup>52</sup> It is submitted that all the courts mean the same, although the wording differs widely. Contrast:

(1) Schuchardt v. Allen, 1 Wall. 359, 17 L. Ed. 642 (U. S. 1863). "Authority without restriction to an agent to sell carries with it authority to warrant." See, to the same effect, Haynor Mfg. Co. v. Davis, 147 N. C. 267, 61 S. E. 54, 17 L. R. A. (N. S.) 193 (1908).

(2) Talmage v. Bierhause, 103 Ind. 270, 2 N. E. 716 (1885). "Until the contrary is made to appear, it will be presumed that a warranty is not an unusual incident to sell by an agent for a dealer in a commodity or article, where the thing sold is not present and subject to inspection."

(3) Reid v. Alaska Packing Co., 47 Or. 215, 83 Pac. 139 (1905). "A mere selling agent, without express power to warrant, cannot give a warranty which will bind his principal, unless the sale is of a class which is ordinarily accompanied by a warranty." See, to the same effect, Piller v. Piser, 67 Misc. Rep. 445, 123 N. Y. Supp. 105 (1910).

<sup>53</sup> Upton v. Mills, 65 Mass. (11 Cush.) 586, 59 Am. Dec. 163 (1853); Smith v. Tracy, 36 N. Y. 79 (1867); Palmer v. Hatch, 46 Mo. 585 (1870); Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4 (1878); Argersinger v. MacNaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep.

rant if he belongs to a class of agents, such as auctioneers, not usually so authorized.<sup>54</sup> If the sale is one usually attended with warranty, the principal will be bound, although the agent was forbidden to warrant, unless the buyer had notice of the restriction;<sup>55</sup> a warranty in such case being within the agent's power.

The cases affirming the power to warrant are for the most part cases in which the court classed the agent as a general agent, and it has sometimes been questioned whether one called a special agent can bind his principal, even by a usual warranty, but upon principle the same rule applies to all agents.<sup>56</sup> But such an agent, not having possession, does not have authority or power to receive payment.<sup>57</sup> A fortiori a traveling agent employed merely to solicit or-

687 (1889); *Johns v. Jaycox*, 67 Wash. 403, 121 Pac. 854, 39 L. R. A. (N. S.) 1151, Ann. Cas. 1913D, 471 (1912); *Morris & Co. v. Bymun Bros.*, 207 Ala. 541, 93 South. 467 (1922).

<sup>54</sup> *Dodd v. Farlow*, 93 Mass. (11 Allen) 426, 87 Am. Dec. 726 (1865).

<sup>55</sup> *Howard v. Sheward*, L. R. 2 C. P. 148 (1866), warranty by A., a horse dealer; *Flatt v. Osborne*, 33 Minn. 98, 22 N. W. 440 (1885).

Otherwise, if the buyer has notice. *Wood Mowing Machine Co. v. Crow*, 70 Iowa, 340, 30 N. W. 609 (1886); *Furneaux v. Esterly*, 36 Kan. 539, 13 Pac. 824 (1887).

<sup>56</sup> *Nelson v. Cowing*, 6 Hill, 336 (N. Y. 1844); *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169 (1872); *Tice v. Gallup*, 2 Hun, 446 (N. Y. 1874).

The servant of a horse dealer, duly authorized to sell, has implied authority to warrant; a warranty on the part of the horse dealer being usual. *Howard v. Sheward*, L. R. 2 C. P. 148 (1866).

The servant of a person not a horse dealer, when authorized to sell privately, has not such implied authority, because such a warranty is not usual. *Brady v. Todd*, 9 C. B. (N. S.) 592, 142 Rep. 233 (1861).

<sup>57</sup> *Seiple v. Irwin*, 30 Pa. 513 (1858); *Higgins v. Moore*, 34 N. Y. 417 (1866); *Law v. Stokes*, 32 N. J. Law, 249, at page 252, 90 Am. Dec. 655 (1867); *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795 (1878); *Simon v. Johnson*, 101 Ala. 368, 13 South. 491 (1893); *Brown v. Lally*, 79 Minn. 38, 81 N. W. 538 (1900); *Goldstein v. Tank*, 149 App. Div. 341, 134 N. Y. Supp. 262 (1912).

Where it was customary to pay traveling salesmen, and the contract made by the salesman provided for payment to him, payment held good. *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682 (1881); *Trainer v. Morison*, 78 Me. 160, 3 Atl. 185, 57 Am. Rep. 790 (1886).

ders has no such power.<sup>58</sup> If it is within the apparent authority of an agent to receive payment, the buyer is, of course, not affected by limitations thereon of which he had no notice.<sup>59</sup> When in such a case the buyer receives from the seller a bill on which is printed or written a notification that payment must be made directly to the principal, it has been held that the buyer, although he fails to read the notification, is charged with constructive notice;<sup>60</sup> but it seems that the question is properly one of fact, and depends upon whether the buyer, under the circumstances, failed to use reasonable care in not discovering the notification.<sup>61</sup> After a sale has been made, such selling agent has no power to modify or rescind it.<sup>62</sup> Of course, authority to sell

<sup>58</sup> *Kornemann v. Monaghan*, 24 Mich. 36 (1871); *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740 (1882); *Janney v. Boyd*, 30 Minn. 319, 15 N. W. 308 (1883); *Chambers v. Short*, 79 Mo. 204 (1883); *Crawford v. Whittaker*, 42 W. Va. 430, 26 S. E. 516 (1896); *Boice-Perrine Co. v. Kelley*, 243 Mass. 327, 137 N. E. 731 (1923).

As to scope of authority of the "drummer," see *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827 (1881); *Ryan & Miller v. American Steel & Wire Co.*, 148 Ky. 481, 146 S. W. 1099 (1912); *Senner & Kaplan v. Mills*, 185 App. Div. 562, 173 N. Y. Supp. 265 (1918); *Planters' Lumber Co. v. Sibley*, 130 Miss. 26, 93 South. 440 (1922). See 15 Harv. Law Rev. 151, 19 Col. Law Rev. 70, and 16 Mich. Law Rev. 459.

As to liability of P. for accommodations and services obtained by the traveling salesman on the credit of his principal, see *Oxweld Acetylene Co. v. Hughes*, 126 Md. 437, 95 Atl. 45, L. R. A. 1916B, 751, Ann. Cas. 1917C, 837 (1915).

<sup>59</sup> *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682 (1881).

<sup>60</sup> *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655 (1867); *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740 (1882); *Kane v. Barstow*, 42 Kan. 465, 22 Pac. 588, 16 Am. St. Rep. 490 (1889). Contra: *Trainer v. Morison*, 78 Me. 160, 3 Atl. 185, 57 Am. Rep. 790 (1886).

<sup>61</sup> *Kinsman v. Kershaw*, 119 Mass. 140 (1875); *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682 (1881); *Trainer v. Morison*, 78 Me. 160, 3 Atl. 185, 57 Am. Rep. 790 (1886); *Luckie v. Johnston*, 89 Ga. 321, 15 S. E. 459 (1892).

<sup>62</sup> *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154 (1867); *Stilwell v. Insurance Co.*, 72 N. Y. 385 (1878); *Fletcher v. Nelson*, 6 N. D. 94, 69 N. W. 53 (1896); *American Sales Book Co. v. Whitaker*, 100 Ark.

does not confer power to transfer in payment of the agent's own debt.<sup>63</sup> This is a necessary corollary of the truth that T. can gain no rights against P. in violation of known restrictions on A.'s power and authority. It is, of course, fundamental that an agent must act in P.'s business in order to bind P., and this therefore constitutes a restriction on A.'s power in dealing with P.

### AGENTS TO SELL REALTY

#### 25. Illustrations as to the scope of agents to sell realty.

Authority to sell land normally includes only authority to procure a prospective customer, and does not include authority or power to bind the principal by a contract to sell.<sup>64</sup> In an exceptional case it may include power to convey.<sup>65</sup> Authority to execute a deed must generally be conferred by power under seal.<sup>66</sup> Authority to sell land is therefore subject to the rule of strict construction applicable to formal instruments, in the discussion of which the construction of the powers to sell real estate has been illustrated to some extent.<sup>67</sup> As we have seen, however, a conveyance executed by an agent authorized only by patrol may take effect as a contract to convey.<sup>68</sup> An agent authorized merely to enter into a contract of sale or to pro-

360, 140 S. W. 132, 37 L. R. A. (N. S.) 91 (1911); *Leverett v. Garland Co.*, 206 Ala. 556, 90 South. 343 (1921); *Churchill, etc., Co. v. Buchman*, 204 App. Div. 30, 197 N. Y. Supp. 552 (1922).

<sup>63</sup> *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488 (1877); *Dowden v. Cryder*, 55 N. J. Law, 329, 26 Atl. 941 (1893); *Hook v. Crowe*, 100 Me. 399, 61 Atl. 1080 (1905); *Platt v. Francis*, 247 Mo. 296, 152 S. W. 332 (1912).

<sup>64</sup> *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499 (1900), and comment in 1 Col. Law Rev. 57; *Rhode v. Gallat*, 70 Fla. 536, 70 South. 471 (1916); *Crumley v. Shelton*, 71 Colo. 466, 208 Pac. 460 (1922); *Karupkat v. Zoph*, 140 Md. 242, 117 Atl. 761 (1922).

<sup>65</sup> See cases in footnote 71, p. 28, chapter II.

<sup>66</sup> See section 8, supra.

<sup>67</sup> See section 11, supra.

<sup>68</sup> See cases in footnote 36, p. 17, chapter II.

cure a prospective purchaser, but not to convey, has no implied authority to receive payment,<sup>69</sup> except such sum as may be payable upon execution of the contract. An agent authorized to convey is thereby authorized to receive any part of the purchase money which is payable at the time,<sup>70</sup> but not deferred payments.<sup>71</sup> It seems that there is no implied authority or power to sell, except for cash,<sup>72</sup> although to give a reasonable credit, securing deferred payment by purchase-money mortgage, might be implied, if a usage to that effect were shown,<sup>73</sup> and would be conferred by a grant of authority to sell "at such terms as usually seem meet."<sup>74</sup> Since authority to convey must be conferred by written instrument, the apparent authority of such an agent is necessarily small.

### AGENTS TO SELL AT AUCTION

#### 26. Illustrations as to the scope of agents employed as auctioneers.

An auctioneer is an agent whose ordinary business is to sell goods or other property to the highest bidder at public sale for a commission. Although he is the agent of the seller, and is exclusively his agent until the knocking down of the goods, he is deemed to be the agent of, and has authority to sign a note or memorandum on behalf of, both seller and buyer to satisfy the statute of frauds.<sup>75</sup> His

<sup>69</sup> Mann's Ex'r's v. Robinson, 19 W. Va. 49, 42 Am. Rep. 771 (1881); Alexander v. Jones, 64 Iowa, 207, 19 N. W. 913 (1884).

<sup>70</sup> Peck v. Harriott, 6 Serg. & R. 146, 9 Am. Dec. 415 (Pa. 1820); Johnson v. McGruder, 15 Mo. 365 (1852); Carson v. Smith, 5 Minn. 78 (Gil. 58), 77 Am. Dec. 539 (1861).

<sup>71</sup> Johnson v. Craig, 21 Ark. 533 (1860), semble.

<sup>72</sup> Henderson v. Beard, 51 Ark. 483, 11 S. W. 766 (1889); Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339 (1894); Winders v. Hill, 141 N. C. 694, 54 S. E. 440 (1906); Howard v. Sills & Purvis, 154 Ga. 430, 114 S. E. 580 (1922).

<sup>73</sup> Silverman v. Bullock, 98 Ill. 11 (1880).

<sup>74</sup> Carson v. Smith, 5 Minn. 78 (Gil. 58), 77 Am. Dec. 539 (1861).

<sup>75</sup> Simon v. Metivier, 1 Wm. Bl. 599 (1766); Hinde v. Whitehouse,

agency extends only to the making of the sale, and ceases as soon as it is made.<sup>76</sup> The principal may, of course, direct the manner and terms of sale, and it is the duty of the auctioneer to obey his instructions.<sup>77</sup> The conditions of sale are ordinarily published or announced at the time of sale, and when the conditions, as stated, conform to the instructions of the principal, they are binding upon seller and buyer.<sup>78</sup> Evidence of verbal declarations on the part of the auctioneer, which tend to vary the printed conditions of sale, is inadmissible.<sup>79</sup> When the principal places some unusual limitation upon the authority of the auctioneer, who fails to give notice of the limitation, and sells in violation of his instructions, it would seem that the sale, being within the apparent authority of the auctioneer,

7 East, 558, 103 Rep. 216 (1806); *McComb v. Wright*, 4 Johns. Ch. 659 (N. Y. 1820); *Morton v. Dean*, 54 Mass. (13 Metc.) 385 (1847).

"The technical ground is that the purchaser, by the very act of bidding, connected with the usage and practice of auction sales, loudly and notoriously calls on the auctioneer or his clerk to put down his name as the bidder, and thus confers on the auctioneer or his clerk authority to sign his name." *Shaw*, C. J., in *Gill v. Bicknell*, 56 Mass. (2 Cush.) 355 (1848).

<sup>76</sup> *Seton v. Slade*, 7 Ves. Jr. 265, at page 276, 32 Rep. 108 (1802); *Bowdoin v. Headley*, 98 South. 32 (Ala. 1923). Thus the memorandum, to satisfy the statute of frauds and bind the purchaser, must be contemporaneous with the sale. *Horton v. McCarty*, 53 Me. 394 (1866). The English court holds, however, that the vendee cannot revoke the auctioneer's authority to sign. *VAN PRAAGH v. EVERIDGE*, [1902] 2 Ch. 266, Powell, Cas. Agency, 55. In this case, however, the memorandum was in fact signed before the auction ended.

<sup>77</sup> *Williams v. Poor*, 3 Cranch, C. C. 251, Fed. Cas. No. 17,732 (U. S. 1827). The auctioneer may pass title to a bidder in violation of his instructions, but becomes personally liable to P. if he does so. *Steele v. Ellmaker*, 11 Serg. & R. 86 (Pa. 1824). Contra, as to the ability to pass title under these circumstances, *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343 (1863).

<sup>78</sup> *Sykes v. Giles*, 5 M. & W. 645, 151 Rep. 273 (1839); *Farr v. John*, 23 Iowa, 286, 92 Am. Dec. 426 (1867); *Morgan v. East*, 126 Ind. 42, 25 N. E. 867, 9 L. R. A. 558 (1890); *Kennell v. Boyer*, 144 Iowa, 303, 122 N. W. 941, Ann. Cas. 1912A, 1127 (1909).

<sup>79</sup> *Gunnis v. Erhart*, 1 H. Bl. 290, 126 Rep. 169 (1789); *Shelton v. Livius*, 2 C. & J. 411, 149 Rep. 175 (1832).

would be binding upon the principal; but it has been held that, if the auctioneer is not authorized to sell for less than a certain amount and sells for less, although he does not give notice of the limitation, the principal is not bound by the sale.<sup>80</sup> There is little justification for enlarging the authority or power of an auctioneer, or indulging in inferences. He has authority, actual or apparent, to receive payment of so much of the price as by the terms of sale is to be paid down,<sup>81</sup> and in case of personal property may maintain an action in his own name for the price or for the goods, if the conditions of the sale are not complied with by the buyer; this doctrine being based upon his right to receive, and his responsibility to the principal for the price, and his lien upon the goods for his commission.<sup>82</sup> An auctioneer has no implied authority to sell at private sale;<sup>83</sup> to sell on credit;<sup>84</sup> or to take a bill or note or check in payment, when it is provided that the whole or any part of the price is to be paid down;<sup>85</sup> to warrant the goods;<sup>86</sup>

<sup>80</sup> *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343 (1863). This case seems to be a product of the old concept that a special agent could not bind his principal beyond the limits of his actual authority, and therefore would probably not be valid to-day.

<sup>81</sup> *Coppin v. Walker*, 7 Taunt. 237, 129 Rep. 95 (1816); *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353 (1869).

<sup>82</sup> *Hulse v. Young*, 16 Johns. 1 (N. Y. 1819); *Flanigan v. Crull*, 53 Ill. 352 (1870); *Johnson v. Buck*, 35 N. J. Law. 338, 10 Am. Rep. 243 (1872).

"In case of real estate he can have no such special property, and would not ordinarily be held entitled to receive the price. But when the terms \* \* \* contemplate the payment of a deposit \* \* \* he may receive and receipt for the deposit," and it seems may sue for it. Per Wells, J., in *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353 (1869).

<sup>83</sup> *Daniel v. Adams*, Amb. 495, 27 Rep. 322 (1764).

<sup>84</sup> *Sykes v. Giles*, 5 M. & W. 645, 151 Rep. 273 (1839); *Williams v. Evans*, L. R. 1 Q. B. 352 (1866).

<sup>85</sup> See cases in next preceding footnote, and, in addition, *Broughton v. Silloway*, 114 Mass. 71, 19 Am. Rep. 312 (1873). The auctioneer may, however, accept a check for such payment, if usage justifies such action. *Farrer v. Lacy*, L. R. 25 Ch. D. 636 (1883).

<sup>86</sup> *Blood v. French*, 75 Mass. (9 Gray) 197 (1857); *Bice v. Siver*, 170 Iowa, 255, 152 N. W. 498 (1915).

to deliver the goods without payment, or to allow a set-off;<sup>87</sup> to rescind a sale once made;<sup>88</sup> or to delegate his authority.<sup>89</sup>

### AGENTS TO PURCHASE

#### 27. Illustrations as to the scope of agents employed to purchase.

Like an agent to sell, an agent to buy personal property has implied authority to fix the price, provided the price is reasonable, and to agree upon the terms of purchase, provided they are usual.<sup>90</sup> If he is not supplied with funds, he has by implication authority, actual or apparent, to buy on credit;<sup>91</sup> but, if he is supplied with funds, such implication does not arise unless the custom of the trade is to buy on credit, or unless P. has previously permitted A. to buy on credit from this T.<sup>92</sup> Neither may he execute negotiable paper in the name of his principal in payment, unless the purpose of the agency cannot otherwise be accomplished.<sup>93</sup> But, if the agency is such that a purchase on

<sup>87</sup> Brown v. Staton, 2 Chit. 353 (1816).

<sup>88</sup> Boinest v. Leignez, 2 Rich. 464 (S. C. 1846); Gardiner v. D. P. S. Nichols Co., 48 Pa. Super. Ct. 510 (1912).

<sup>89</sup> Com. v. Harnden, 36 Mass. (19 Pick.) 482 (1837); Stone v. State, 12 Mo. 400 (1849).

<sup>90</sup> Wishard v. McNeill, 85 Iowa, 474, at page 479, 52 N. W. 484 (1892); Jones Cotton Co. v. Snead, 169 Ala. 566, 53 South. 988 (1910); Whitaker v. Dunlap-Morgan Co., 44 Cal. App. 140, 186 Pac. 181 (1919).

No authority or power therefrom to agree on an account stated. Hartline v. Allen, 207 Ala. 407, 92 South. 648 (1922).

<sup>91</sup> SPRAGUE v. GILLETT, 50 Mass. (9 Metc.) 91, Powell, Cas. Agency, 22 (1845); Spear & Tietjen Supply Co. v. Van Riper, 103 Fed. 689 (D. C. 1900); Brittain v. Westall, 137 N. C. 30, 49 S. E. 54 (1904).

Cf. Taft v. Baker, 100 Mass. 68 (1868).

<sup>92</sup> Jaques v. Todd, 3 Wend. 83 (N. Y. 1829); Boston Iron Co. v. Hale, 8 N. H. 363 (1836); Temple v. Pomroy, 70 Mass. (4 Gray) 128 (1855); Komorowski v. Krumdick, 56 Wis. 23, 13 N. W. 881 (1882); Wheeler v. McGuire, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808 (1888); Chapman v. Americus Oil Co., 117 Ga. 881, 45 S. E. 268 (1903).

<sup>93</sup> Webber v. Williams College, 40 Mass. (23 Pick.) 302 (1839);

credit is usual, the principal is bound, notwithstanding undisclosed limitations upon that authority.<sup>94</sup> If authorized to buy on credit, he may make the necessary representations as to the solvency of the buyer.<sup>95</sup> He has no authority or power to buy goods of a different kind,<sup>96</sup> or of a different amount,<sup>97</sup> or for a higher price,<sup>98</sup> or from persons with whom he is not authorized to deal.<sup>99</sup> If, however, he has been employed in a capacity in which an agent so employed would usually have power to make the purchase in question, he can bind his principal within the scope of such apparent or usual authority.<sup>1</sup>

### AGENTS TO COLLECT

#### 28. Illustrations as to the scope of agents employed to collect.

Authorization to receive payment will be implied whenever it is a necessary and usual incident of the business delegated, and may be implied from a course of dealing between the parties, or from other circumstances.<sup>2</sup> The mere fact that an agent is intrusted with a note payable to his principal is not sufficient to create authority, either actual

Temple v. Pomroy, 70 Mass. (4 Gray) 128 (1855); Oberne v. Burke, 30 Neb. 581, 46 N. W. 839 (1890).

<sup>94</sup> Wheeler v. McGuire, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808 (1888); Liddell v. Sahline, 55 Ark. 627, 17 S. W. 705 (1891).

<sup>95</sup> Hunter v. Machine Co., 20 Barb. 493 (N. Y. 1855).

<sup>96</sup> Hopkins v. Blane, 1 Call, 361 (Va. 1798).

<sup>97</sup> Olyphant v. McNair, 41 Barb. 446 (N. Y. 1864).

<sup>98</sup> Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96 (1846).

<sup>99</sup> Peckham v. Lyon, 4 McLean, 45, Fed. Cas. No. 10,899 (U. S. 1845); Eckart v. Roehm, 43 Minn. 271, 45 N. W. 443 (1890).

<sup>1</sup> Butler v. Maples, 9 Wall. 766, 19 L. Ed. 822 (U. S. 1869); Hill v. Miller, 76 N. Y. 32 (1879); Shrimpton & Son v. Erice, 102 Ala. 655, 15 South. 452 (1893). See ante, sections 16 and 17.

<sup>2</sup> Quinn v. Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138 (1888); Luckie v. Johnston, 89 Ga. 321, 15 S. E. 459 (1892).

The circumstances may be such as to confer power on A. to collect and thereby to bind P. where actual authority is absent. Howe Machine Co. v. Ballweg, 89 Ill. 318 (1878), and cases cited supra.

or apparent, to collect it.<sup>3</sup> Neither is authority to collect money payable under a contract to be implied from the fact that the agent has negotiated it.<sup>4</sup> An agent who has negotiated a loan, and who is permitted to retain possession of the note or other securities, such as a bond or mortgage, has authority, actual or apparent, to collect the interest and the principal when they fall due, unless the debtor has notice of the limitation upon the agent's authority.<sup>5</sup> The debtor must satisfy himself at his peril that the agent has possession, for the implication of authority ceases whenever the securities are withdrawn from his possession.<sup>6</sup>

<sup>3</sup> Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502 (1872); Wardrop v. Dunlop, 1 Hun, 325, affirmed 59 N. Y. 634 (1874).

The fact that a bill presented by an alleged agent was made out in the handwriting of the seller and upon his bill head is not evidence of authorization to collect. Hirshfield v. Waldron, 54 Mich. 649, 20 N. W. 628 (1884).

<sup>4</sup> Tew v. Labiche, 4 La. Ann. 526 (1849); Ortmeier v. Ivory, 208 Ill. 577, 70 N. E. 665 (1904); State v. Lawrence, 130 Minn. 10, 153 N. W. 123 (1915); Goetzman v. Danitz, 116 Misc. Rep. 140, 189 N. Y. Supp. 788 (1921); Colonial Trust Co. v. Davis, 274 Pa. 363, 118 Atl. 312 (1922).

<sup>5</sup> Williams v. Walker, 2 Sandf. Ch. 325 (N. Y. 1845); Hatfield v. Reynolds, 34 Barb. 614 (N. Y. 1861); O'Loughlin v. Billy, 95 App. Div. 99, 88 N. Y. Supp. 567 (1904); Hoffman v. Froma Realty Co., 153 App. Div. 770, 138 N. Y. Supp. 935, affirmed 211 N. Y. 525, 105 N. E. 1087 (1914).

Cf. Dorman v. West Jersey Title & Guaranty Co., 92 N. J. Law, 487, 105 Atl. 195 (1918).

<sup>6</sup> Williams v. Walker, 2 Sandf. Ch. 325 (N. Y. 1845); Guilford v. Stacer, 53 Ga. 618 (1875); Whelan v. Reilly, 61 Mo. 565 (1876); Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157 (1877); Stiger v. Bent, 111 Ill. 328 (1884); Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323 (1886), interpreting section 324, N. Y. Real Property Law; Security Co. v. Graybeal, 85 Iowa, 543, 52 N. W. 497, 39 Am. St. Rep. 311 (1892); Budd v. Broen, 75 Minn. 316, 77 N. W. 979 (1899).

Of course, actual authority may be shown, although there is not possession. Shane v. Palmer, 43 Kan. 481, 23 Pac. 594 (1890); General Conv. of Congreg. Ministers v. Torkelsen, 73 Minn. 401, 76 N. W. 215 (1898); Dexter v. Berge, 76 Minn. 216, 78 N. W. 1111 (1899); Springfield Sav. Bank v. Kjaer, 82 Minn. 180, 84 N. W. 752 (1901).

As to whether or not it is necessary for the debtor to see the se-

Authority to collect means to receive payment in legal currency; that is, in legal tender, or what is by common consent considered and tendered as money and passes as such at par.<sup>7</sup> An agent employed to collect is not authorized to receive payment in merchandise,<sup>8</sup> or by bill or note,<sup>9</sup> or even by check.<sup>10</sup> If authorized to receive paper in lieu of cash, he has no authority, actual or apparent, to indorse.<sup>11</sup> He may receive part payment on account of the

curities, if they are in fact in the possession of the possessor, see *Hatfield v. Reynolds*, 34 Barb. 614 (N. Y. 1861), and compare therewith *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643 (1890).

The fact that a note is by its terms payable at a particular bank does not constitute the named bank an agent for collection, unless the note has been left with it for that purpose. *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207 (U. S. 1868); *Stansbury v. Embrey*, 128 Tenn. 103, 158 S. W. 991, 47 L. R. A. (N. S.) 980 (1913).

<sup>7</sup> *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207 (U. S. 1868); *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12 (1886); *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726 (1888); *Hadley Milling Co. v. Kelley*, 117 Ark. 173, 174 S. W. 227 (1915); *Bankers' Reserve Life Co. v. Sommers*, 242 S. W. 258 (Tex. Civ. App. 1922).

<sup>8</sup> *Mudgett v. Day*, 12 Cal. 139 (1859); *PITKIN v. HARRIS*, 69 Mich. 133, 37 N. W. 61, *Powell, Cas. Agency*, 57 (1888); *Wees v. Page*, 47 Wash. 213, 91 Pac. 766 (1907); *Fidelity & Deposit Co. of Md. v. Brock's Garage*, 92 N. J. Law, 239, 104 Atl. 132 (1918).

<sup>9</sup> *Sykes v. Giles*, 5 M. & W. 645, 151 Rep. 273 (1839); *Drain v. Doggett*, 41 Iowa, 682 (1875); *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12 (1886); *Scully v. Dodge*, 40 Kan. 395, 19 Pac. 807 (1888).

<sup>10</sup> *Bridges v. Garrett*, L. R. 5 C. P. 451 (1870); *Broughton v. Silloway*, 114 Mass. 71, 19 Am. Rep. 312 (1873). See, as to judicial notice of a usage to accept checks under such circumstances, *Griffin v. Erskine*, 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193 (1906); *Potter v. Sager*, 184 App. Div. 327, 171 N. Y. Supp. 438 (1918).

<sup>11</sup> *Hogg v. Snaith*, 1 Taunt. 347, 127 Rep. 867 (1808); *Graham v. Institution*, 46 Mo. 186 (1870); *Robinson v. Bank*, 86 N. Y. 404 (1881); *Jackson v. Bank*, 92 Tenn. 154, 20 S. W. 820, 18 L. R. A. 663, 36 Am. St Rep. 81 (1892); *Burstein v. Sullivan*, 134 App. Div. 623, 119 N. Y. Supp. 317 (1909); *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 124 N. W. 236, 50 L. R. A. (N. S.) 74 (1910); *Porges v. U. S. Mortgage & Trust Co.*, 135 App. Div. 484, 120 N. Y. Supp. 487 (1909), reversed 203 N. Y. 181, 96 N. E. 424 (1911); *Morrison v. Chapman*, 155 App. Div. 509, 140 N. Y. Supp. 700 (1913).

debt,<sup>12</sup> but has no authorization to discharge it for less than the whole amount, or to compromise,<sup>13</sup> or to extend the time of payment.<sup>14</sup> He is not authorized to receive payment before the obligation is due,<sup>15</sup> or to collect the principal by reason of authority to collect the interest.<sup>16</sup> Authority to collect implies authority to take all necessary and usual means therefor, and hence, among other things, to employ counsel and to bring suit.<sup>17</sup>

### AGENTS TO EXECUTE COMMERCIAL PAPER

#### 29. Illustrations as to the scope of agents authorized to execute commercial paper.

Authority to draw, accept, make, or indorse bills, notes, and checks will not be implied readily as an incident to the express authority of an agent.<sup>18</sup> It must ordinarily be conferred expressly. The authority may be implied if the exe-

<sup>12</sup> Williams v. Walker, 2 Sandf. Ch. 325 (N. Y. 1845); Whelan v. Reilly, 61 Mo. 565 (1876).

<sup>13</sup> Herring v. Hottendorf, 74 N. C. 588 (1876); Padfield v. Green, 85 Ill. 529 (1877); First Nat. Bank v. Messner, 25 N. D. 263, 141 N. W. 999 (1913); Hosher-Platt Co. v. Miller, 238 Mass. 518, 131 N. E. 310 (1921).

<sup>14</sup> Ritch v. Smith, 82 N. Y. 627 (1880).

<sup>15</sup> Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157 (1877); Park v. Cross, 76 Minn. 187, 78 N. W. 1107, 77 Am. St. Rep. 630 (1899); Everdell v. Carrington, 154 App. Div. 500, 139 N. Y. Supp. 119 (1913); Wynn v. Grant, 166 N. C. 39, 81 S. E. 949 (1914).

<sup>16</sup> Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157 (1877); Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323 (1886).

<sup>17</sup> Davis v. Waterman, 10 Vt. 526, 33 Am. Dec. 216 (1838); Merrick v. Wagner, 44 Ill. 266 (1867). Cf. Hoover v. Greenbaum, 61 N. Y. 305 (1874); and see 9 Harv. Law Rev. 151.

As to the power of an agent authorized to collect to bring foreclosure proceedings, see Ryan v. Tudor, 31 Kan. 366, 2 Pac. 797 (1884); Burchard v. Hull, 71 Minn. 430, 74 N. W. 163 (1898); Plummer v. Knight, 156 Mo. App. 321, 137 S. W. 1019 (1911).

<sup>18</sup> Webber v. Williams College, 40 Mass. (23 Pick.) 302 (1839); PAIGE v. STONE, 51 Mass. (10 Metc.) 160, 43 Am. Dec. 420, Powell, Cas. Agency, 58 (1845); Chicago Electric Light Renting Co. v. Hutchinson, 25 Ill. App. 476 (1888). See 1 Mich. Law Rev. 405. On this topic generally, see L. R. A. 1916C, 135.

cution of the paper is a necessary incident to the business,<sup>19</sup> but it will not be deemed a necessary incident, unless the purpose of the agency cannot be accomplished otherwise.<sup>20</sup> The rule has already been illustrated in discussing the powers of agents employed to buy,<sup>21</sup> and will be further discussed in the next section.<sup>22</sup> Where the power is expressly conferred, it must be strictly pursued, and, except to the extent that the apparent authority of the agent exceeds his actual authority, paper executed by him will not bind the principal, if the agent departs from the terms of his authority in regard to the amount<sup>23</sup> or time<sup>24</sup> of the paper or its character in other respects.<sup>25</sup> Where the power exists, however, it is confined to the business of the agency, and does not authorize the making of paper for the benefit of the agent,<sup>26</sup> or the making of accommodation paper.<sup>27</sup>

<sup>19</sup> *Yale v. Eames*, 42 Mass. (1 Metc.) 486 (1840). Power to indorse without recourse is a necessary incident to authority to sell a note. *Beaman v. Whitney*, 20 Me. 413 (1841); *Merchants' Bank v. Bank*, 1 Ga. 418, 44 Am. Dec. 665 (1846). Power to indorse is a necessary incident to authority to discount. *Park Hotel Co. v. Fourth Nat. Bank of St. Louis*, 86 Fed. 742, 30 C. C. A. 409 (1898); *Utah Banking Co. v. Newman*, 44 Utah, 194, 138 Pac. 1146 (1914).

<sup>20</sup> *Temple v. Pomroy*, 70 Mass. (4 Gray) 128 (1855); *Jackson v. Bank*, 92 Tenn. 154, 20 S. W. 802, 18 L. R. A. 663, 36 Am. St. Rep. 81 (1893), and cases cited in footnote 18, *supra*, p. 83.

<sup>21</sup> See section 27, *supra*.

<sup>22</sup> See cases in footnotes 39-42, p. 86, *infra*.

<sup>23</sup> *Blackwell v. Ketcham*, 53 Ind. 184 (1876); *King v. Sparks*, 77 Ga. 285, 1 S. E. 266, 4 Am. St. Rep. 85 (1887); *U. S. Bank v. Herron*, 73 Or. 391, 144 Pac. 661, L. R. A. 1916C, 125 (1914).

<sup>24</sup> *Batty v. Carswell*, 2 Johns. 48 (N. Y. 1806); *Tate v. Evans*, 7 Mo. 419 (1842); *N. Y. Iron Mine Co. v. Bank*, 44 Mich. 344, 6 N. W. 823 (1880).

<sup>25</sup> *Stainback v. Read*, 52 Va. (11 Grat.) 281, 62 Am. Dec. 648 (1854); *Mechanics' Bank v. Schaumburg*, 38 Mo. 228 (1866); *Farmington Savings Bank v. Buzzell*, 61 N. H. 612 (1882), and cases cited in footnote 34, p. 86.

<sup>26</sup> *North River Bank v. Aymar*, 3 Hill, 262 (N. Y. 1842); *Stainback v. Read*, 52 Va. (11 Grat.) 281, 62 Am. Dec. 648 (1854); *Camden Safe*

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<sup>27</sup> *Wallace v. Bank*, 1 Ala. 565 (1840); *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728 (1868).

## AGENTS TO MANAGE A BUSINESS

## 30. Illustrations as to the scope of an agent employed to manage a business.

The authority and power of an agent intrusted with the general management of some particular business is *prima facie* coextensive with the business delegated to his care, and includes authorization to do whatever is necessary and usual to carry into effect the principal power or powers, and whatever is within the scope of the authority usually confided to an agent employed in that capacity.<sup>28</sup> The powers of managing agent, therefore, while differing with the different nature of the business are necessarily very broad. Thus, the manager of a store,<sup>29</sup> a hotel,<sup>30</sup> a farm,<sup>31</sup> or a mine,<sup>32</sup> has authority or power to buy upon his principal's credit whatever goods or supplies are needful to

Deposit & Trust Co. v. Abbott, 44 N. J. Law, 257 (1882); Park Hotel Co. v. Fourth Nat. Bank of St. Louis, 86 Fed. 742, 30 C. C. A. 409 (1898); N. Y. Life Insurance Co. v. Daley, 25 Cal. App. 376, 143 Pac. 1033 (1914).

But the agent may have *power* to bind P. in the execution of commercial paper, although he is in fact acting for his own benefit. Warren-Scharf Co. v. Bank, 97 Fed. 181, 38 C. C. A. 108 (1899).

<sup>28</sup> Smith v. McGuire, 3 H. & N. 554, 157 Rep. 589 (1858); Edmunds v. Bushell, L. R. 1 Q. B. 97 (1865); German Fire Insurance Co. v. Grunert, 112 Ill. 68, 1 N. E. 113 (1884); Collins v. Cooper, 65 Tex. 460 (1886); Watteau v. Fenwick, [1893] 1 Q. B. 346; Roche v. Pennington, 90 Wis. 107, 62 N. W. 946 (1895); Lowenstein v. Lombard, Ayres & Co., 164 N. Y. 324, 58 N. E. 44 (1900); Hodges v. Bankers' Surety Co., 152 Ill. App. 372 (1910); Co-op. Stores Co. v. Marianna, 128 Ark. 196, 193 S. W. 529 (1917); Eastern Shore, etc., Co. v. Harrison, 141 Md. 91, 118 Atl. 192 (1922); Allen Gravel Co. v. Nix, 129 Miss. 809, 93 South. 244 (1922).

<sup>29</sup> Banner Tobacco Co. v. Jenison, 48 Mich. 459, 12 N. W. 655 (1882); Louisville Coffin Co. v. Stokes, 78 Ala. 372 (1884).

<sup>30</sup> Cummings v. Sargent, 50 Mass. (9 Metc.) 172 (1845); Beecher v. Venn, 35 Mich. 466 (1877).

<sup>31</sup> Burley v. Kitchell, 20 N. J. Law, 305 (1844); Carter v. Burnham, 31 Ark. 212 (1876).

<sup>32</sup> Stuart v. Adams, 89 Cal. 367, 26 Pac. 971 (1891); Heald v. Hendy, 89 Cal. 632, 27 Pac. 67 (1891).

conduct the business, and to make whatever other contracts, such as contracts of employment, as are needful to that end.<sup>33</sup> Beyond what is necessary and usual, his powers cease.<sup>34</sup> The manager of a store or farm has authority or power to sell whatever is necessary or usual in the conduct of the business to sell;<sup>35</sup> but he may not sell the business,<sup>36</sup> or mortgage it,<sup>37</sup> or engage in a different business.<sup>38</sup> He has no authority or power to borrow, unless the power to borrow is necessarily to be implied from the nature of the business,<sup>39</sup> and the mere fact that it would be convenient or advantageous,<sup>40</sup> or the mere existence of a sudden emergency, is not enough to justify borrowing.<sup>41</sup> Subject to the same limitations, he has no power or authority to make negotiable paper.<sup>42</sup>

<sup>33</sup> *Taylor v. Labeaume*, 17 Mo. 333 (1852); *Roche v. Pennington*, 90 Wis. 107, 62 N. W. 946 (1895).

<sup>34</sup> *Brockway v. Mullin*, 46 N. J. Law, 448, 50 Am. Rep. 442 (1884); *Basnight v. Dare Lumber Co.*, 184 N. C. 51, 113 S. E. 510 (1922).

The burden is on the plaintiff to show that the goods are such as the nature of the business justified. *Wallis Tobacco Co. v. Jackson*, 99 Ala. 460, 13 South. 120 (1892).

<sup>35</sup> *JOHNSTON v. MILWAUKEE & WYOMING INV. CO.*, 46 Neb. 480, 64 N. W. 1100, Powell, Cas. Agency, 26 (1895).

<sup>36</sup> *Vescelius v. Martin*, 11 Colo. 391, 18 Pac. 338 (1888); *Goodman v. Delfs*, 193 Iowa, 1183, 188 N. W. 809 (1922).

<sup>37</sup> *Despatch Line of Packets v. Mfg. Co.*, 12 N. H. 205, 228, 37 Am. Dec. 203 (1841); *Henson v. Mercantile Co.*, 48 Mo. App. 214 (1892). Cf. *In re McArthur*, 173 App. Div. 517, 159 N. Y. Supp. 1050, order modified 174 App. Div. 987, 160 N. Y. Supp. 1137 (1916).

<sup>38</sup> *Hazeltine v. Miller*, 44 Me. 177 (1857); *Campbell v. Hastings*, 29 Ark. 512 (1874); *Cowan v. Sargent Mfg. Co.*, 141 Mich. 87, 104 N. W. 377 (1905).

<sup>39</sup> *Perkins v. Boothby*, 71 Me. 91 (1880); *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438 (1887); *Heath v. Paul*, 81 Wis. 532, 51 N. W. 876 (1892); *Williams v. Dugan*, 217 Mass. 526, 105 N. E. 615, (1914). See collection of authorities in L. R. A. 1916C, 110.

<sup>40</sup> *Consolidated Nat. Bank v. Steamship Co.*, 95 Cal. 1, 30 Pac. 96, 29 Am. St. Rep. 85 (1892).

<sup>41</sup> *Hawtayne v. Bourne*, 7 M. & W. 595, 151 Rep. 905 (1841).

<sup>42</sup> *Temple v. Pomroy*, 70 Mass. (4 Gray.) 128 (1855); *Perkins v. Boothby*, 71 Me. 91 (1880); *Chicago Electric Light Renting Co. v. Hutchinson*, 25 Ill. App. 476 (1888); *Fairly v. Nash*, 70 Miss. 193, 12 South. 149 (1892).

Where the agent has been permitted to appear as principal, such

## INSURANCE AGENTS

### 31. Illustrations as to the scope of insurance agents.

The name "insurance agent" is applied to persons possessing widely different authorities and powers. Insurance companies of necessity do business at places far from the home office. Thus, some representatives have authority only to solicit applications; others add to this the authority to fix the rates of insurance, and to fill up, countersign, and issue policies. Still others have authority to attend to all matters between the insured and the insurer. In fire insurance particularly, some agents have authority in the case of loss to determine the quantum of loss allowed, while others have the broader ability to pass on the question of the insurer's liability.<sup>43</sup> With these widely varying connotations for the name "insurance agent," it is apparent that a limited discussion, such as this, must content itself with generalizations. Insurance agents are frequently and inaccurately classified as "local" and "general"; but the extent of the territory which is to be the field of his agency is no test of an agent's authority within that field.<sup>44</sup> As in other fields, the delegation of any specific field of tasks, in the absence of express limitation, carries with it by implication power, if not authority, to do all things which are reasonably necessary or usual to effect the principal powers,<sup>45</sup> and the authority or power thus

power, if exercised, has been held to bind the real principal. *Edmunds v. Bushell*, L. R. 1 Q. B. 97 (1865).

<sup>43</sup> *National Fire Ins. Co. v. Crabtree*, 151 Ark. 561, 237 S. W. 97 (1922); *Com. Ins. Co. v. Solomon*, 119 Atl. 850 (Del. 1923).

<sup>44</sup> *Ermentrout v. Insurance Co.*, 63 Minn. 305, at page 310, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481 (1896).

<sup>45</sup> *Malleable Iron Works v. Insurance Co.*, 25 Conn. 465 (1857); *Woodbury Savings Bank, etc., v. Insurance Co.*, 31 Conn. 517 (1863); *Viele v. Insurance Co.*, 26 Iowa, 9, 96 Am. Dec. 83 (1868); *Union Mutual Life Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617 (U. S. 1871); *Ruggles v. Insurance Co.*, 114 N. Y. 415, 21 N. E. 1000,

conferred is the apparent authority of A. in the relations between P. and T. growing out of A.'s activities. Within the scope of his authority, actual or apparent, the acts of the agent are binding upon the company, and beyond its scope the company is not bound.<sup>46</sup> Notice of limitations upon the agent's authority may be actual or constructive.<sup>47</sup>

Frequently a provision is inserted in the policy that "no officer, agent, or other representative of the company shall have any power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon and added hereto and \* \* \* then only in writing." The question is often presented whether an agent may have authority or power to waive this nonwaiver clause. Some courts have held that T. may prove that A. has authority or power to waive this clause.<sup>48</sup> The distinct weight of authority is clearly contra as to breaches subsequent to the issuance of the policy, on the ground that the provisions of the policy operate as constructive notice to the insured of the limitations imposed; it being immaterial whether or not he reads the policy or has actual knowledge of the limitations.<sup>49</sup> It would seem that the tendency is contra as to

11 Am. St. Rep. 674 (1889); *Forward v. Insurance Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637 (1894).

<sup>46</sup> *Bush v. Insurance Co.*, 63 N. Y. 531 (1876); *Lohnes v. Insurance Co.*, 121 Mass. 439 (1877); *Strickland v. Insurance Co.*, 66 Iowa, 466, 23 N. W. 926 (1885); *Kyte v. Assurance Co.*, 144 Mass. 43, 10 N. E. 518 (1887); *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144 (1888); *Ermentrout v. Insurance Co.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481 (1895); *Hall v. Insurance Co.*, 23 Wash. 610, 63 Pac. 505, 51 L. R. A. 288, 83 Am. St. Rep. 844 (1900).

<sup>47</sup> *Baines v. Ewing*, 4 H. & C. 511 (1866); *Fleming v. Insurance Co.*, 42 Wis. 616 (1877).

<sup>48</sup> *United States Ins. Co. v. Lesser*, 126 Ala. 568, 28 South. 646 (1899); *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339 (1902); *Ward v. Concordia Fire Ins. Co.*, 211 Mo. App. 554, 244 S. W. 959 (1922); *McDowell v. Firemen's Fund Ins. Co.*, 191 N. W. 350 (N. D. 1922).

<sup>49</sup> *Walsh v. Insurance Co.*, 73 N. Y. 5 (1878); *Cleaver v. Insur-*

events occurring prior to the issuance of the policy, which would avoid the policy as issued, and which the insured claims have been waived.<sup>50</sup>

## BANK CASHIERS

### 32. Illustrations as to the scope of a bank cashier.

The cashier of a bank is its general executive officer. It is customary for him to be intrusted with the funds and securities of the bank, and directly or through its subordinate officers under his direction to conduct its financial operations.<sup>51</sup> His implied authority is very large. "Ordinarily the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking."<sup>52</sup> Thus, by virtue of his office, he usually has authority to collect debts due the bank;<sup>53</sup> to receive payment and give certificates of deposit and other proper vouchers, and when a depositor has sufficient funds in the bank to certify a check to be good;<sup>54</sup> to draw checks and bills upon the

ance Co., 65 Mich. 527, 33 N. W. 660, 8 Am. St. Rep. 908 (1887); Burlington Ins. Co. v. Gibbons, 43 Kan. 15, 22 Pac. 1010, 19 Am. St. Rep. 118 (1890); Quinlan v. Insurance Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645 (1892); Rhode Island Ins. Co. v. Phelps, 141 Md. 362, 118 Atl. 749 (1922); Drilling v. N. Y. Life Ins. Co., 234 N. Y. 234, 137 N. E. 314 (1922). See, also, N. Y. Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934 (1886).

<sup>50</sup> See Northern Assurance Co. v. Grand View, etc., 183 U. S. 309, 22 Sup. Ct. 133, 46 L. Ed. 213 (1902) for elaborate review of the decisions. Contra: Kausal v. Insurance Ass'n, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776 (1883); Crouse v. Insurance Co., 79 Mich. 249, 44 N. W. 496 (1890). See 12 Harv. Law Rev. 503.

<sup>51</sup> Merchants' Nat. Bank v. Bank, 10 Wall. 604, 19 L. Ed. 1008 (U. S. 1870).

<sup>52</sup> West St. Louis Sav. Bank v. Bank, 95 U. S. 557, 24 L. Ed. 490 (1877).

<sup>53</sup> Badger v. Bank, 26 Me. 428 (1847); Merchants' Nat. Bank v. Bank, 10 Wall. 604, 19 L. Ed. 1008 (U. S. 1870).

<sup>54</sup> Merchants' Nat. Bank v. Bank, 10 Wall. 604, 19 L. Ed. 1008 (U. S. 1870).

funds of the bank deposited elsewhere;<sup>55</sup> to buy and sell bills of exchange;<sup>56</sup> to indorse and transfer negotiable paper in the regular course of business;<sup>57</sup> as well as to do many other acts necessary or usual in the conduct of the business.<sup>58</sup> Within the scope of the authority or power ordinarily confided to cashiers as determined by usage, his acts are binding upon the bank in favor of third persons, notwithstanding unusual restrictions upon his authority of which they have no notice.<sup>59</sup> Thus, if, in disobedience to his instructions, he certifies a check, the bank is bound by the certification unless the person to whom it is issued has notice that the cashier was forbidden to certify.<sup>60</sup> His apparent authority is, of course, confined to transactions actually or apparently for the benefit of the bank and does not extend to the making of accommodation paper,<sup>61</sup> or to the making of an assignment of the bank's assets.<sup>62</sup>

<sup>55</sup> *Merchants' Nat. Bank v. Bank*, 10 Wall. 604, 19 L. Ed. 1008 (U. S. 1870).

<sup>56</sup> *Fleckner v. Bank*, 8 Wheat. 338, at page 360, 5 L. Ed. 631 (U. S. 1823); *Wild v. Bank*, 3 Mason, 505, Fed. Cas. No. 17,646 (U. S. 1825).

<sup>57</sup> *Wild v. Bank*, 3 Mason, 505, Fed. Cas. No. 17,646 (U. S. 1825); *City Bank v. Perkins*, 29 N. Y. 554, 86 Am. Dec. 332 (1864).

<sup>58</sup> As to his authority generally, see Morse, *Banks and Banking*, §§ 152, 160.

<sup>59</sup> *Fleckner v. Bank*, 8 Wheat. 360, 5 L. Ed. 631 (U. S. 1823); *Minor v. Bank*, 1 Pet. 46, at page 70, 7 L. Ed. 47 (U. S. 1828); *Cooke v. Bank*, 52 N. Y. 96, 11 Am. Rep. 667 (1873); *Matthews v. Bank*, 1 Holmes, 396, Fed. Cas. No. 9286 (U. S. 1874); *Case v. Bank*, 100 U. S. 446, at page 454, 25 L. Ed. 695 (1879).

<sup>60</sup> *Cooke v. Bank*, 52 N. Y. 96, 11 Am. Rep. 667 (1873). See footnotes 32 and 33, p. 48, in chapter III.

<sup>61</sup> *West St. Louis Sav. Bank v. Bank*, 95 U. S. 557, 24 L. Ed. 490 (1877).

<sup>62</sup> *Ledgerwood v. Dashiell*, 177 S. W. 1010 (Tex. Civ. App. 1915).

## ATTORNEYS AT LAW

## 33. Illustrations as to the scope of an attorney at law.

An attorney at law is an agent whose distinctive business is to conduct suits and controversies in courts of law and other judicial tribunals. He is an officer of the court,<sup>63</sup> and must be duly qualified by the court in which he appears. In England and some parts of Canada, the business of litigation is divided between barristers, or counsel, who represent their clients in court proceedings, and solicitors, who represent them in all matters of litigation other than court appearances; but in the United States these functions are usually exercised by one and the same person.<sup>64</sup> Broadly speaking, an attorney has implied authority "to do all acts in or out of court necessary or incidental to the prosecution or management of the suit, and which affect the remedy only, and not the cause of action."<sup>65</sup> It is impossible, however, by any general statement, to indicate the line between the acts which such an agent may and may not do. He may make admissions of fact;<sup>66</sup> he may adopt any mode of prosecuting the case which the law provides, as, for example, he may submit the case to arbitration, or stipulate that a reference be had,<sup>67</sup> stipulate that the judgment shall be the same as in another pending ac-

<sup>63</sup> *Berman v. Coakley*, 243 Mass. 348, 137 N. E. 667, 26 A. L. R. 92 (1923).

<sup>64</sup> As to the authority of counsel and solicitor under the divided system, see *Bowstead, Agency* (1919) §§ 4, 5, 39.

<sup>65</sup> *Gray, C. J.*, in *Moulton v. Bowker*, 115 Mass. 36, at page 40, 15 Am. Rep. 72 (1874). See, also, *Halliday v. Stuart*, 151 U. S. 229, 14 Sup. Ct. 302, 38 L. Ed. 141 (1894); *James v. Commonwealth*, 197 Ky. 577, 247 S. W. 945 (1923).

<sup>66</sup> *Lewis v. Sumner*, 54 Mass. (13 Metc.) 269 (1847); *Farmers' Bank v. Sprigg*, 11 Md. 389 (1857).

<sup>67</sup> *Holker v. Parker*, 7 Cranch, 436, 3 L. Ed. 396 (U. S. 1813); *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396 (1820); *Brooks v. Town of New Durham*, 55 N. H. 559 (1875); *Sargeant v. Clark*, 108 Pa. 588 (1885). See 25 Harv. Law Rev. 558.

tion;<sup>68</sup> he may waive the right to appeal;<sup>69</sup> he may dismiss or continue the action;<sup>70</sup> or release an attachment before judgment.<sup>71</sup> On the other hand, he may not confess judgment against his client;<sup>72</sup> release the cause of action;<sup>73</sup> release property of defendant from the lien of a judgment or execution, except in conformity to statutory provision;<sup>74</sup> or, according to the weight of authority in the United States, compromise the claim.<sup>75</sup>

<sup>68</sup> Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. 277 (1887).

<sup>69</sup> Pike v. Emerson, 5 N. H. 393, 22 Am. Dec. 468 (1831).

<sup>70</sup> Gaillard v. Smart, 6 Cow. 385 (N. Y. 1826); Rogers v. Greenwood, 14 Minn. 333, Gil. 256 (1869); Barrett v. Railroad Co., 45 N. Y. 628 (1871).

<sup>71</sup> Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72 (1874); Benson v. Carr, 73 Me. 76 (1881).

<sup>72</sup> Pfister v. Wade, 69 Cal. 133, 10 Pac. 369 (1886).

<sup>73</sup> Mandeville v. Reynolds, 68 N. Y. 528 (1877).

<sup>74</sup> Benedict v. Smith, 10 Paige, 126 (N. Y. 1843); Phillips v. Dobbins, 56 Ga. 617 (1876).

By the provisions of section 530 of the New York Civil Practice Act judgments can be satisfied by an attorney of record in the Supreme Court within a period of two years after the entry thereof.

<sup>75</sup> Maddux v. Bevan, 39 Md. 485 (1874); Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647 (1875); Mandeville v. Reynolds, 68 N. Y. 528 (1877); Granger v. Batchelder, 54 Vt. 248, 41 Am. Rep. 846 (1881); Wetherbee v. Fitch, 117 Ill. 67, 7 N. E. 513 (1886); Watt v. Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811 (1891).

It is otherwise in England, provided the attorney acts bona fide and reasonably. Prestwich v. Poley, 18 C. B. (N. S.) 806, 144 Rep. 662 (1865). Accord: Bonney v. Morrill, 57 Me. 368 (1869).

"Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney had been imposed upon or not fairly exercised in the case." Marshall, C. J., in Holker v. Parker, 7 Cranch, 436, at page 452, 3 L. Ed. 396 (U. S. 1813). Compare, as to the power of an attorney to compromise when the attorney has the case on a contingent basis, Jeffries v. Insurance Co., 110 U. S. 305, 4 Sup. Ct. 8, 28 L. Ed. 156 (1884), and dictum in Barrett v. Railroad Co., 45 N. Y. 628 (1871).

## CHAPTER V

### AUTHORITY AND POWER OF AN AGENT TO BIND HIS PRINCIPAL BY TORTS OTHER THAN FRAUD

34. Divisions of Liability for Torts.
35. Requisites for Actual Authority.
36. Respondeat Superior.
37. Entrepreneur Theory.
38. Tests for Determining Scope of Employment.

### DIVISIONS OF LIABILITY FOR TORTS

34. Liability of an employer for torts other than fraud is divisible into two parts:

- (1) Where the tort was actually authorized by the one sought to be charged; and
- (2) Where the employer is held liable for the torts of his employee, although such tort was either unauthorized or expressly forbidden.

In chapters II, III, and IV, herein, we discussed the ability of one, called A., to impose upon another, known as P., contract obligations to T. We found that this ability arose sometimes from actual authorization to make the contract, actually made,<sup>1</sup> and that it arose on other occasions from such conduct of P. as entitled T. as a reasonable man to believe A. had been so authorized.<sup>2</sup> Thus authority and power were distinguished. The same distinction has validity in the field of liability for torts. An employer may have expressly commanded his worker to do a particular act which, when done, constitutes a tort to some third person. Often, however, this is not the case. Most torts committed by employees for which the injured parties seek to collect damages from the employer were unau-

<sup>1</sup> Ante, chapter II.

<sup>2</sup> Ante, chapter III.

thorized, and frequently arose from acts of the employee which had been expressly forbidden.<sup>3</sup>

So, then, we are to seek the limitations of an agent's "authority" and "power" to bind his principal in tort. That which we really desire to know is the extent to which employees coming within the definition of agent as heretofore given have the ability to impose liability in tort upon an employer. One of the chief topics in treatises on Master and Servant is the ability of a servant to impose such liability, and there is no reason to suppose that the imposition of such liability by an agent is governed by any different principles or considerations than govern the case of a servant.<sup>4</sup>

One who is an agent in the restricted sense may be also a servant, or he may be an independent contractor. To the extent that he is a servant he may have authority or power to impose liability in tort upon his employer.<sup>5</sup> To the

<sup>3</sup> "The rule of respondeat superior, or that the master shall be civilly liable for the tortious act of his servant, is of universal application, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable, and it makes no difference that the master did not authorize, or even know, of the servant's act or neglect; or even if he disapproved or forbade, he is equally liable, if the act be done in the course of the servant's employment." *Philadelphia & Reading R. Co. v. Derby*, 14 How. 468, at page 486, 14 L. Ed. 502 (U. S. 1852).

See *Limpus v. London General Omnibus Co.*, 1 H. & C. 526, 158 Rep. 993 (1862); *Rounds v. D. L. & W. R. Co.*, 64 N. Y. 129, at page 134, 21 Am. Rep. 597 (1876); *Becker v. Borck*, 157 N. Y. Supp. 505 (Sup. 1916); *Wegge v. G. N. R. Co.*, 61 Mont. 377, 203 Pac. 360 (1922).

See 6 Mich. Law Rev. 265. This latter field is the one referred to, but not explained, by the phrase "respondeat superior."

<sup>4</sup> See *Vance*, 4 Mich. Law Rev. 199, to the effect that the liability of an employer for contracts made by a "servant" should be determined by the laws of Agency, while the employer's liability for the ministerial acts of an "agent" should be determined by laws of Master and Servant.

*Baty, Vicarious Liability* (1916) c. II. At page 41 Baty says: "It is as a servant that the agent entails liability (for torts) on the principal."

<sup>5</sup> *Patten v. Rea*, 2 C. B. (N. S.) 606, 140 Rep. 554 (1857); *Bacon v. Mich. Cent. R. Co.*, 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372 (1884); *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 13 Pac.

extent that he is an independent contractor he may have authority, but probably he cannot have power, to impose such tort liability upon his employer.<sup>6</sup>

The torts, other than fraud of an agent, as to which liability is most frequently sought to be imposed on the employer, are defamation,<sup>7</sup> false imprisonment,<sup>8</sup> malicious

609, 59 Am. Rep. 571 (1887); *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440; (1889); *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824 (1893); *Rexroth v. Holloway*, 45 Ind. App. 36, 90 N. E. 87 (1909); *Prowd v. Gore*, 57 Cal. App. 458, 207 Pac. 490 (1922); *Dishman v. Whitney*, 121 Wash. 157, 209 Pac. 12 (1922).

Cf. *Otis Elevator Co. v. First Nat. Bank of San Francisco*, 163 Cal. 31, 124 Pac. 704, 41 L. R. A. (N. S.) 529 (1912).

<sup>6</sup> *STATE v. SMITH*, 78 Me. 260, 4 Atl. 412, 57 Am. Rep. 802, Powell, Cas. Agency, 64 (1886); *Premier Motor, etc., Co. v. Tilford*, 61 Ind. App. 164, 111 N. E. 645 (1916); *Barton v. Studebaker Corp.*, 46 Cal. App. 707, 189 Pac. 1025 (1920). See, also, cases in footnote 39, p. 105, infra.

<sup>7</sup> *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73 (U. S. 1858), directors of corporation; *Bacon v. Mich. Cent. R. Co.*, 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372 (1884), hiring agent of a corporation; *Fogg v. Boston & L. R. Corp.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583 (1889), general passenger agent of railroad; *PALMERI v. MANHATTAN RY. CO.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632, Powell, Cas. Agency, 62 (1892), railroad ticket agent; *Allen v. News Publishing Co.*, 81 Wis. 120, 50 N. W. 1093 (1892), editor of newspaper; *Pennsylvania Iron Co. v. Vogt Mach. Co.*, 139 Ky. 497, 96 S. W. 551, 8 L. R. A. (N. S.) 1023, 139 Am. St. Rep. 504 (1906), sales manager; *Corrigan v. Bobbs-Merrill Co.*, 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662 (1920), officers of a publishing house; *Hines v. Gravins*, 112 S. E. 869 (Va. 1922), freight agent of railroad.

Cf. *Southern Ry. Co. v. Chambers*, 126 Ga. 404, 55 S. E. 37, 7 L. R. A. (N. S.) 926 (1906); *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 43 South. 210, 9 L. R. A. (N. S.) 929, 124 Am. St. Rep. 90 (1907).

<sup>8</sup> *Caswell v. Cross*, 120 Mass. 545 (1876), collection agency; *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571 (1887), general distributing sales agent; *PALMERI v. MANHATTAN RY. CO.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632, Powell, Cas. Agency, 62 (1892), railroad ticket agent; *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824 (1893), clerk in charge of store; *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19 (1896), superintendent of manufacturing plant.

Cf. *Bushardt v. United Inv. Co.*, 113 S. E. 637 (S. C. 1922), clerk in charge of drug store.

prosecution,<sup>9</sup> conversion,<sup>10</sup> and, more recently, unfair business competition.<sup>11</sup>

### REQUISITES FOR ACTUAL AUTHORITY

35. Language or conduct amounts to actual authorization of a particular tort when P.'s expression or actions fairly show that P. has requested, aided, advised, or countenanced the commission of a tort committed for his (P.'s) benefit.

Suppose P. tells A. to go and bring the brown horse which he will find at the X. stables. A. brings the horse, which is really the property of T.<sup>12</sup> Here P. has commanded an act which, when done, constitutes a trespass, clearly actionable by T. as against A.<sup>13</sup> T. also has an action against P. This is the type of case to which the maxim "Qui facit per alium, facit per se," may be correctly applied.<sup>14</sup> The liability of P. in this type of case is not a vicarious liability, since P. has really participated in the

<sup>9</sup> Copley v. Grover & Baker Sewing-Mach. Co., 2 Woods, 494, Fed. Cas. No. 3,213 (U. S. 1875), officer of a corporation; Reed v. Home Savings Bank, 130 Mass. 443, 39 Am. Rep. 468 (1881), officer of a savings bank; Turner v. Phoenix Ins. Co., 55 Mich. 236, 21 N. W. 326 (1884), general agent of insurance company.

If, however, the agent is an independent contractor, his employer is not liable for the tort. Larson v. Fidelity, etc., Ass'n, 71 Minn. 101, 73 N. W. 711 (1898).

<sup>10</sup> Semple v. Morganstern, 97 Conn. 402, 116 Atl. 906, 26 A. L. R. 21 (1922); Casey v. Kastel, 119 Misc. Rep. 116, 195 N. Y. Supp. 848 (1922).

<sup>11</sup> Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930, 1136, L. R. A. 1915B, 1179, 1195 (1913).

<sup>12</sup> Moir v. Hopkins, 16 Ill. 313, 63 Am. Dec. 312 (1855). See, also, Maier v. Randolph, 33 Kan. 340, 6 Pac. 625 (1885).

<sup>13</sup> McConnell v. Prince, 12 Ga. App. 54, 76 S. E. 754 (1912); Semple v. Morganstern, 97 Conn. 402, 116 Atl. 906, 26 A. L. R. 21 (1922); Semonian v. Panoras, 44 R. I. 165, 116 Atl. 417, 20 A. L. R. 83, reargument denied 117 Atl. 235 (R. I. 1922).

<sup>14</sup> See Pollock, 1 L. Q. R. 207, at page 209.

commission of the tort.<sup>15</sup> Thus the authorization sufficient to base this type of tort liability may be couched in language not amounting to an express command, providing it fairly shows that the one sued has requested, aided, advised, or countenanced the commission of the tort, and provided it is also established that the tort was committed for the benefit of the one sued.<sup>16</sup> Neither P. nor A. need to have intended the commission of the tort.<sup>17</sup> P. is bound by his expressions, and not by his inward intent.<sup>18</sup> Thus, in the case above, P. may have intended A. to get the consent of the owner of the brown horse before bringing it, but he did not say so. So, also, if P. told A. to go to a certain lumber yard and bring from it the lumber pointed out to him by the yard superintendent, and the yard superintendent pointed out lumber not belonging to P., but belonging to T., and A. brought that lumber, both P. and A. are liable in trespass to T.<sup>19</sup> As in other cases of agency, conduct may be equivalent to language.<sup>20</sup> So the command or its equivalent may be given directly from P. to A., or through the instrumentality of a third person, whom P. directs A. to obey, or by conduct. In cases of this type,

<sup>15</sup> *Herring v. Hoppock*, 15 N. Y. 409, page 413 (1857), "All persons who direct or request another to commit a trespass are liable as cotrespassers;" *STATE v. SMITH*, 78 Me. 260, 4 Atl. 412, 57 Am. Rep. 802, Powell, Cas. Agency, 64 (1886).

<sup>16</sup> *Herring v. Hoppock*, 15 N. Y. 409 (1857); *Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17, 142 N. W. 930, 1136, L. R. A. 1915B, 1179, 1195 (1913); *Hines v. Fireman's Fund Ins. Co.*, 235 S. W. 174 (Mo. App. 1921), reversed on facts *State ex rel. Fireman's Fund Ins. Co. v. Trimble*, 294 Mo. 615, 242 S. W. 934 (1922); *Semple v. Morganstern*, 97 Conn. 402, 116 Atl. 906, 26 A. L. R. 21 (1922), semble.

<sup>17</sup> *Maier v. Randolph*, 33 Kan. 340, 6 Pac. 625 (1885); *STATE v. SMITH*, 78 Me. 260, 4 Atl. 412, 57 Am. Rep. 802, Powell, Cas. Agency, 64 (1886); *Semple v. Morganstern*, 97 Conn. 402, 116 Atl. 906, 26 A. L. R. 21 (1922).

<sup>18</sup> *May v. Bliss*, 22 Vt. 477 (1850); *Moir v. Hopkins*, 16 Ill. 313, 63 Am. Dec. 312 (1855).

<sup>19</sup> *May v. Bliss*, 22 Vt. 477 (1850).

<sup>20</sup> *Hill v. Morey*, 26 Vt. 178 (1854).

if A.'s conduct is of such a character that it would base a trespass as distinguished from a case action against A., then T. may also bring a trespass action against P.<sup>21</sup> Furthermore, P. may be held for exemplary damages, whereas, in cases of respondeat superior, only compensatory damages are usually allowed as against the employer.<sup>22</sup>

<sup>21</sup> *May v. Bliss*, 22 Vt. 477 (1850); *Moir v. Hopkins*, 16 Ill. 313, 63 Am. Dec. 312 (1855).

<sup>22</sup> Exemplary damages allowed against employer, where agent was actually authorized to commit the tort. *Corrigan v. Bobbs-Merrill Co.*, 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662 (1920).

Exemplary damages denied where the employer did not participate in the tort, or ratify it after its commission. *Hagan v. Providence & W. R. Co.*, 3 R. I. 88, 62 Am. Dec. 377 (1854); *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375 (1874); *Eviston v. Cramer*, 57 Wis. 570, 15 N. E. 760 (1883); *Lake Shore, etc., Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97 (1892), and comment thereon in 7 Harv. Law Rev. 45; *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824 (1893); *Warner v. Southern Pac. Ry. Co.*, 113 Cal. 105, 45 Pac. 187, 54 Am. St. Rep. 327 (1896); *Maisenbacker v. Society Concordia*, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213 (1899); *Chicago, R. I. & P. R. Co. v. Newburn*, 27 Okl. 9, 110 Pac. 1065, 30 L. R. A. (N. S.) 432 (1910); *Dunshee v. Standard Oil Co.*, 165 Iowa, 625, 146 N. W. 830 (1914); *Pullman Co. v. Alexander*, 117 Miss. 348, 78 South. 293 (1918); *Hines v. Gravins*, 112 S. E. 869 (Va. 1922).

See collection of authorities in 12 Mich. Law Rev. 237, and 21 Col. Law Rev. 824.

Exemplary damages allowed, although the employer did not participate in the tort or ratify its commission. *Goddard v. Grand Trunk Ry. of Canada*, 57 Me. 202, 2 Am. Rep. 39 (1869), excellent collection of authorities; *Atlantic & G. W. Ry. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382 (1869); *Philadelphia, W. & B. Ry. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442 (1877); *Clark v. Bland et al.*, 181 N. C. 110, 106 S. E. 491 (1921). Cf. *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 134 Pac. 753, 136 Pac. 705, 48 L. R. A. (N. S.) 1 (1913).

## RESPONDEAT SUPERIOR

36. The doctrine of respondeat superior, originating about 1700, has developed rapidly since that date.

In the normal case against the principal, no claim is advanced that the principal participated in the commission of the tort, except by hiring the tort-feasor to do a task, in the doing of which, but not as a necessary part of which, the tort was committed. Historically, the earliest rule of liability made a man absolutely liable for injuries caused to others by himself, members of his family, servants, animals, or even by inanimate objects within his property limits.<sup>23</sup> There was no excuse or defense. Gradually the law began to recognize excuses, and liability finally became restricted to cases where culpability was established. If P. could not be shown to have commanded the exact conduct of A., T. could not hold him.<sup>24</sup> Near the end of the seventeenth century Lord Holt, using as his point of departure earlier cases of absolute liability for fire, wild animals, and straying cattle, began to develop an additional liability of P. for the torts of A.<sup>25</sup> This new liability, apparently manufactured out of whole cloth, was enforced through an action on the case. The doctrine of re-

<sup>23</sup> Wigmore, Responsibility for Tortious Acts, 7 Harv. Law Rev. 315, 383. Cf. Baty, Vicarious Liability (1916) p. 9.

<sup>24</sup> Doctor and Student, Dialogue II, c. XLII (1518), 18th Ed., pp. 236-238: "And the same law is, if a servant make a contract in his master's name, the contract shall not bind his master unless it were by his master's commandment, or that it came to the master's use by his assent. \* \* \* Also, if a man send his servant to the market with a thing which he knoweth to be defective to be sold to a certain man, and he selleth to him, there an action lieth against the master: but if the master biddeth him not to sell it to any person in certain, but generally to whom he can, and he selleth it accordingly, there lieth no action of disseit against the master."

See 3 Col. Law Rev. 206.

<sup>25</sup> See excellent account of this judicial legislation of Holt in Baty, Vicarious Liability (1916) pp. 9-28. See, also, 3 Col. Law Rev. 206, and Holmes, 4 Harv. Law Rev. 345, 354 ff.

spondeat superior, thus originated, has continued as a constantly developing branch of our law.

### ENTREPRENEUR THEORY

37. In imposing vicarious liability for torts, it is frequently first necessary to determine which of several persons is the one for whom the tort-feasor was working. This is determined by ascertaining whose work was being done; i. e., the entrepreneur as a part of whose organization A. was functioning.

In the present days of complex business organization, after a tort has been committed by an individual obviously working for someone else, it is very frequently quite difficult to ascertain which of several persons is the one for whom he was working. Thus, in Schmedes v. Deffaa, 153 App. Div. 819, 138 N. Y. Supp. 931, reversed in 214 N. Y. 675, 108 N. E. 1107 (1915), on the dissent below, a suit was brought against a livery stable keeper, claiming that the driver had been negligent in driving a certain carriage at a funeral. It appeared that an undertaker who had general charge of the funeral ordered a certain number of carriages from the defendant. The defendant did not have enough carriages available, so he applied to one Naughton for one carriage. Naughton sent one of his drivers with a carriage and horses to the defendant, who passed him on to the undertaker, under whose directions the driver drove in the funeral. The question was which of the several persons concerned was liable for the driver's admitted negligence.<sup>26</sup>

This question, however, must be settled before we can approach the problem as to whether the tort "was with-

<sup>26</sup> See, also, Simmons v. Murray, 209 Mo. App. 248, 234 S. W. 1009 (1921); Wagner v. Motor Truck Renting Corp., 234 N. Y. 31, 136 N. E. 229 (1922).

See, also, 17 Harv. Law Rev. 51; 7 Mich. Law Rev. 606.

in the scope of employment" of the agent by that principal. The question is raised in various ways. T. may think that X. is the one for whom A. was working at the time the tort was committed. If X. can show that he had loaned A. to Y., and that A. was really working for Y. when the tort was committed, T. recovers nothing from X.<sup>27</sup> If X. can show that he had made an arrangement with Y. as an independent contractor and that A. was working for this independent contractor when he committed the tort, X. will likewise be insulated from liability.<sup>28</sup>

What considerations, then, govern the selection and the determination of the one for whom the tort-feasor was working? The United States Supreme Court has dealt with this problem and said:

"Whose servant was the winchman when he was guilty of the negligence which caused the injury? \* \* \* The accepted reason for it (the master's responsibility) is that the master is answerable for the wrongs of his servant, not because he has authorized them, nor because the servant in his negligent conduct represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. \* \* \* The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work, or that of some other, the master is not answerable for his negligence in the performance of it.

"To determine whether a given case falls within the one class or the other, we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and to direct the servants in the performance of their work."<sup>29</sup>

Many courts have considered the power to control as the

<sup>27</sup> See cases cited in footnote 38, p. 104, *infra*.

<sup>28</sup> See cases cited in footnote 39, p. 105, *infra*.

<sup>29</sup> Standard Oil Co. v. Anderson, 212 U. S. 215, at page 220, 29 Sup. Ct. 252, 53 L. Ed. 480 (1908).

sole determining factor,<sup>30</sup> and hence, at times, have been constrained to interpret the facts as placing control in one who in no real sense had control in order not to reach a result which seems to be absurd.<sup>31</sup> It is submitted that control is but one factor to be considered,<sup>32</sup> and that equally important with (1) control are the inquiries as to (2) who furnished the tools or mechanical devices employed at the time the tort was committed, (3) who had the chance of profit, or (4) loss upon the enterprise in the course of which the tort occurred.<sup>33</sup> This rests the liability as em-

Much litigation has centered about the question whether the driver of a family automobile is engaged in the business of the father or head of the family. For collections of authorities on this question, see *Kohlmeier v. Allen*, 201 App. Div. 445, 194 N. Y. Supp. 597 (1922); *Stickney v. Epstein*, 123 Atl. 1 (Conn. 1923); 20 Col. Law Rev. 213; 28 Harv. Law Rev. 91; 19 Mich. Law Rev. 543.

<sup>30</sup> *Sadler v. Henlock*, 4 E. & B. 570, 119 Rep. 209 (1855); *Billig v. Southern Pac. Co.*, 189 Cal. 477, 209 Pac. 241 (1922). 33 Harv. Law Rev. 714, apparently falls into this error.

Cf. *Pollock*, 1 L. Q. R. 207, at page 210.

<sup>31</sup> *McNamara v. Leipzig*, 227 N. Y. 291, 125 N. E. 244, 8 A. L. R. 480 (1919), and note thereon in 20 Col. Law Rev. 333; *Billig v. Southern Pac. Co.*, 189 Cal. 477, 209 Pac. 241 (1922).

Courts adopting this view of control place a very heavy burden on trial judges, for it becomes necessary for the trial judge to include in a definition of "control" the other elements actually considered, but which really are not properly connoted by the word. An illustration of this sort of charge can be found in *Cattini v. Am. Ry. Express Co.*, 202 App. Div. 336, 196 N. Y. Supp. 10, at page 20, affirmed in 234 N. Y. 585, 138 N. E. 456 (1922).

<sup>32</sup> "The right to supervise, control, and direct the work is one of the tests for determining the nature of the relation which exists, but it is not the sole test. \* \* \* No one fact can be relied on as a test or criterion, but the nature of the relation must be determined from all the evidence." *Barrett v. Selden-Breck Construction Co.*, 103 Neb. 850, 174 N. W. 866 (1919).

<sup>33</sup> "The maxim of *respondeat superior* is founded on the principle that he who expects to derive an advantage from the act which is done by another for him, must answer for any injury which another may sustain from it." Dictum in *Barker v. Chicago, P. & St. L. Ry. Co.*, 243 Ill. 482, 90 N. E. 1057, 26 L. R. A. (N. S.) 1058, 134 Am. St. Rep. 382 (1909); *Gallagher's Case*, 240 Mass. 455, 134 N. E. 344 (1922), held, in a case where the one, sought to be charged, clearly had control, that he was nevertheless not liable as an employer:

ployer upon the entrepreneur theory, and assumes that, when we have determined the business enterprise in the course of which the tort occurred, we have determined that business enterprise, if any, which should reimburse the injured third person. The justification for this position has been fully discussed elsewhere,<sup>34</sup> and it rests upon the belief that the only rational justification for the doctrine of respondeat superior is the principle back of Workmen's Compensation Laws,<sup>35</sup> to wit, that it is socially expedient to spread upon the community those losses which experience has taught are inevitable in the carrying on of busi-

FRANKS v. CARPENTER, 192 Iowa, 1398, 186 N. W. 647, Powell, Cas. Agency, 70 (1922), held that the one sought to be charged was liable because he could not claim that he was insulated from liability by the interposition of an independent contractor, since the one asserted to be an independent contractor "stood no chance to make a profit or suffer a loss."

"Ordinarily no one fact is decisive. The payment of wages; the right to hire or discharge; the right to direct the servant where to go and what to do; the custody or ownership of the tools or appliances he may use in his work; the business in which the master is engaged or that of him said to be a special employer—none of these things give us an infallible test. At times, any or all of them may be considered. The question remains: In whose business was the servant engaged at the time?" BRAXTON v. MENDELSON, 233 N. Y. 122, 135 N. E. 198, Powell, Cas. Agency, 68 (1922).

For an exposition and development of this theory, see 20 Col. Law Rev. 98, 333.

<sup>34</sup> Young B. Smith, 23 Col. Law Rev. 444, at page 456.

<sup>35</sup> "To the economist, the necessity of such legislation is abundantly evident. It is simply that the needs of the modern state require that the burden of loss of life or personal injury in industry shall be charged to the expenses of production—shall be borne, that is to say, by the employer. He knows well enough that eventually the cost will be paid by the community in the form of increased prices, but that is something it is not unwilling to pay." Laski, *The Basis of Vicarious Liability*, 26 Yale Law J. 105, at page 126.

See Ives v. South Buffalo R. Co., 201 N. Y. 271, at page 286, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156 (1911); Jensen v. Southern Pac. Co., 215 N. Y. 514, at page 519, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276 (1915).

See Honnold, *Workmen's Compensation* (1917), for a collection of cases setting forth the principle of the statute.

ness. The business enterprise so charged includes the expense thus incurred as a part of its cost of doing business, and thus spreads the loss upon the community as a part of the selling price of its commodity.<sup>36</sup>

The question, "Who was this man's employer?" cannot be answered by meditations in one's chamber, but must depend for answer upon an investigation of the facts of each case along the four lines indicated, and a determination therefrom as to who was the entrepreneur as a part of whose organization the tort-feasor was functioning. The attributes which distinguish the entrepreneur from the capitalist and wage-earner are these four.<sup>37</sup>

If an investigation of the facts of a particular case show that a majority of these attributes belong to Y., rather than to X., then Y. is the one who should be held liable for A.'s tort, and not X. These results may be reached in a case where X. has loaned A. to Y., so that A. has become a part of the enterprise of which Y. is the entrepreneur.<sup>38</sup> So, also, these results may be reached where X. has hired Y. as an independent contractor, and A. has been a part of

<sup>36</sup> "The justification of this policy is that the loss to wage-earners resulting from the accidents of industry should be regarded as an expense of production which the employer should bear, as he bears other expenses of production, and which, since the burden falls on all employers alike, he will be able normally to recover in the somewhat higher prices he will obtain for his goods." Seager, *Principles of Economics* (1918) 601.

"\* \* \* That in the imperfect state of human knowledge and capacity there are bound to occur mistakes, accidents, and other unpreventable losses, and that those losses should be borne in the first instance by the party in the better position to insure against them. Thus with regard to industrial accidents the employer is held liable because he is in a better position to figure the cost of insurance in advance and add it to the legitimate cost of production." M. R. Cohen, *Review of Pound's Introduction to the Philosophy of Law* (1922) 22 Col. Law Rev. 775.

<sup>37</sup> 20 Col. Law Rev. 333, at page 335.

<sup>38</sup> WOOD v. COBB, 95 Mass. (13 Allen) 58, Powell, Cas. Agency, 73 (1866); Higgins v. W. U. Tel. Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537 (1898); Hartell v. Simonson & Son Co., 218 N. Y. 345, 113 N. E. 255 (1916).

the organization of this independent contractor. In such a case X. should not be liable,<sup>39</sup> unless there be some independent basis for X.'s liability.<sup>40</sup>

## TESTS FOR DETERMINING SCOPE OF EMPLOYMENT

38. P. is liable for A.'s torts committed within the scope of his employment. A tort is within such scope—
- (1) If A., in doing the act in the doing of which the tort was committed, was motivated in part at least by a desire to serve his employer; and
  - (2) If it further appears that the act in the doing of which the tort was committed was not an extreme deviation from the normal conduct of such employees.

After we have determined the person who, if any one, was A.'s principal, we must next find whether or not the tort was committed by A. within the scope of his employ-

<sup>39</sup> Quarman v. Burnett, 6 M. & W. 499, 151 Rep. 509 (1840); Murphrey v. Caralli, 3 H. & C. 462, 159 Rep. 611 (1864); Murray v. Currie, L. R. 6 C. P. 24 (1870); Lawrence v. Shipman, 39 Conn. 586 (1873); Kellogg v. Church Foundation, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883 (1911); Cattini v. Am. Ry. Express Co., 202 App. Div. 336, 196 N. Y. Supp. 10, affirmed 234 N. Y. 585, 138 N. E. 456 (1922); Producers' Lumber Co. v. Butler, 87 Okl. 172, 209 Pac. 738 (1922); Harris v. Farmers' & Merchants' State Bank of Ranger, 239 S. W. 1027 (Tex. Civ. App. 1922); 2 Col. Law Rev. 112; 20 Col. Law Rev. 98, 333; 18 Harv. Law Rev. 144; 28 Harv. Law Rev. 100.

<sup>40</sup> For exceptions to the insulating effects of the employment of an independent contractor, see Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957, 41 L. R. A. 391, 66 Am. St. Rep. 542 (1898); Van Dam v. Doty, etc., Co., 218 Mich. 32, 187 N. W. 285 (1922); Miami Quarry Co. v. Seaborg Packing Co., 103 Or. 362, 204 Pac. 492 (1922); Alexis v. Pittinger, 119 Wash. 626, 206 Pac. 370 (1922). See note in 2 Col. Law Rev. 112. Practically all of these so-called exceptions are really cases in which the one hiring the independent contractor is liable in tort by actual participation in the tort which has caused the damage. 15 Harv. Law Rev. 485; 26 Harv. Law Rev. 650; 34 Harv. Law Rev. 551; 5 Mich. Law Rev. 706.

ment, for, as Baron Parke said: "The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make the master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."<sup>41</sup>

As has been well said: "From that day until the present time judges and lawyers have been wrestling with the problem of what is a frolic and what is a detour."<sup>42</sup> The niceties of this problem are beyond the scope of this treatise, and we shall therefore limit our consideration to the principles which point the way to a decision of the relatively simple cases usually arising with respect to agents.

An examination of a large number of cases discussing vicarious liability for tort shows that where two factors are present such liability is imposed, but that where either of the two factors is missing such liability is not imposed.<sup>43</sup> These factors are:

(1) Satisfactory evidence that the employee in doing the act, in the doing of which the tort was committed, was motivated in part at least by a desire to serve his employer;<sup>44</sup> and

<sup>41</sup> *Joel v. Morison*, 6 C. & P. 501, at page 503 (1834).

<sup>42</sup> Young B. Smith, 23 Col. Law Rev. 444. Cf. Pollock, 1 L. Q. R. 207, at page 213.

<sup>43</sup> The reason for the rule of respondeat superior has been diligently sought without satisfactory results. Pollock, 1 L. Q. R. 207, at page 209; Baty, Vicarious Liability (1916). See cases in footnotes 45, 46, and 47, pp. 107, 108, *infra*.

<sup>44</sup> "It must be appreciated that the element of stepping aside, commonly found in the rule, does not require any particular period of cessation from the business or going away from the place thereof. A mental attitude of stepping aside, even momentarily, turning the attention to the accomplishment of a purpose solely outside of that of promoting the object of the employment, effectively breaks the connection \* \* \* vital to the [master's] liability." FIREMEN'S FUND INS. CO. v. SCHREIBER, 150 Wis. 42, 135 N. W. 507, 45 L. R. A. (N. S.) 314, Ann. Cas. 1913E, 823, Powell, Cas. Agency, 74 (1912).

"The purpose of the act rather than its method of perform-

(2) Satisfactory evidence that the act, in the doing of which the tort was committed, was not an extreme deviation from the normal conduct of such employees. For the sake of brevity, we shall henceforth refer to these as the "motivation-deviation" tests.

Cases fall into four groups:

(1) On the trial of an action, if no man could reasonably decide that the employee had any motive except his personal one, a verdict for the defendant should be directed.<sup>45</sup>

(2) Similarly, if no man could reasonably decide that A.'s conduct was within the limits of reasonable deviation, a verdict for the defendant should be directed.<sup>46</sup>

ance is the test of the scope of his employment." *Hoffman v. Roehl*, 61 Mont. 290, 203 P. 349, 20 A. L. R. 189 (1921).

See, also, *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490 (1901); *Hardeman v. Williams*, 150 Ala. 415, 43 South. 726, 10 L. R. A. (N. S.) 653 (1907); *Scoccia v. Streeter*, 121 Wash. 21, 207 Pac. 1044 (1922).

The significance of the agent's attitude of mind was stressed in the Appellate Division decision, but was regarded as immaterial by the Court of Appeals of New York, in *Clawson v. Pierce-Arrow Motor Car Co.*, 182 App. Div. 172, 170 N. Y. Supp. 310, reversed 231 N. Y. 273, 131 N. E. 914 (1921). See, also, the criticisms of the consideration of intent in 13 Harv. Law Rev. 303, and 32 Harv. Law Rev. 172.

<sup>45</sup> *Mitchell v. Crassweller*, 13 C. B. 238, 138 Rep. 1189 (1853); *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635 (1877); *Ill. Cent. Ry. v. Latham*, 72 Miss. 32, 16 South. 757 (1894); *REILLY v. CONNABLE*, 214 N. Y. 586, 108 N. E. 853, L. R. A. 1916A, 954, Ann. Cas. 1916A, 656; *Powell Cas. Agency*, 80 (1915); *Der Ohannessian v. Elliott*, 233 N. Y. 326, 135 N. E. 518 (1922); *National Petroleum Ins. Co. v. Payne*, etc., 187 N. W. 138 (N. D. 1922).

<sup>46</sup> *Edwards v. London & N. W. Ry. Co.*, L. R. 5 C. P. 445 (1870); *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635 (1877); *Ritchie v. Waller*, 63 Conn. 155, at page 161, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361 (1893), dictum, "So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on his master's business at all;" *Fleischner v. Durgin*, 207 Mass. 435, 93 N. E. 801, 33 L. R. A. (N. S.) 79, 20 Ann. Cas. 1291 (1911). See, also, the dissenting opinion of Brett, J., in *Burns v. Poulsom*, L. R. 8 C. P. 563 (1873). Cf. *Fiocco v. Carver*, 200 App. Div. 33, 192 N. Y. Supp. 493, reversed in 234 N. Y. 219, 137 N. E. 309 (1922).

(3) Conversely, it would seem that, if all must reasonably believe that A. was animated in part at least by the desire to serve his employer, and that A.'s act was within the limits of reasonable deviation, the judge should charge the jury that the employer is liable for the tort of his employee as a matter of law.

(4) If, however, men could reasonably differ on the conclusion of fact as to either or both of these tests, and the case does not come within the first or second group above, the case should be submitted to the jury as to that issue, or issues as to which men might reasonably differ.<sup>47</sup>

Courts differ greatly as to what will be construed as evidence of partial motivation, and as to what will constitute a reasonable deviation, and hence differ as to what facts constitute a mere "detour," for a tort during which the employer is liable, and a "frolic" for a tort in the course of which the employer is exempt from liability.<sup>48</sup> Some

<sup>47</sup> "Nor \* \* \* would it be unreasonable for them [the jury] to have found that he [A.] was acting within the scope of his employment, inasmuch as they might not unreasonably have thought that the act was one done for his master's benefit, and with a zealous desire to expedite the work, and, for aught I know, in a manner proper and even usual under the circumstances for a person employed as Malone was at that time." *Burns v. Poulsom*, L. R. 8 C. P. 563 (1873).

<sup>48</sup> Rounds v. D., L. & W. Ry., 64 N. Y. 129, 21 Am. Rep. 597 (1876); Howard v. Ludwig, 171 N. Y. 507, 64 N. E. 172 (1902); Baker v. Allen & Arnink Auto Renting Co., 231 N. Y. 8, 131 N. E. 551 (1921); Ryne v. Liebers Farm Eq. Co., 107 Neb. 454, 186 N. W. 358 (1922); TUTTLE v. DODGE, 80 N. H. 304, 116 Atl. 627, Powell, Cas. Agency, 82 (1922).

<sup>48</sup> See, in general, on this topic, Young B. Smith, 23 Col. Law Rev. 444, 716. Cf. 3 Mich. Law Rev. 670.

Construed as a detour: *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361 (1893), while returning with a load of manure the servant drove in a roundabout way to have his own shoes mended.

Construed as a frolic: *Mitchell v. Crassweller*, 13 C. B. 238, 138 Rep. 1189 (1853), after getting within five hundred feet of the employer's barn the servant drove an ill coemployee home; on the way back the servant negligently injured the plaintiff. *Storey v. Ashton*, L. R. 4 Q. B. 476 (1869), after getting within a quarter of a mile of

propositions are well settled. Thus, the employer does not escape liability by showing the employee, at the time that the tort was committed, was engaged in a dual enterprise, part of which was for the employer and part of which was not for the employer.<sup>49</sup> Nor does the employer relieve himself from liability by showing that the act or conduct of A. causing the tort was unknown to him, or expressly forbidden by him,<sup>50</sup> or done by the servant willfully.<sup>51</sup> It is also well settled that the mere fact that the employer intrusted the employee with the physical objects, in the course of the handling of which by the employee the tort was committed, does not make the employer liable.<sup>52</sup>

the employer's barn the servant drove in a different direction on an errand for a coemployee; while on the out trip the servant negligently injured the plaintiff. See, also, *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635 (1877); *Cannon v. Goodyear Tire, etc., Co.*, 60 Utah, 346, 208 Pac. 519 (1922).

Construed as a frolic because in direction opposite to that called for by the employment: *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490 (1901); *Patterson v. Kates (C. C.)* 152 Fed. 481 (1907); *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670 (1908). Contra, in a case where the return journey had begun: *RILEY v. STANDARD OIL CO.*, 231 N. Y. 301, 132 N. E. 97, 22 A. L. R. 1382, Powell, Cas. Agency, 88 (1921), and criticism thereof in 20 Mich. Law Rev. 98.

<sup>49</sup> *Patten v. Rea*, 2 C. B. (N. S.) 606, 140 Rep. 554 (1857); *Phelon v. Stiles*, 43 Conn. 426 (1876); *Cohen v. Dry Dock, etc., Ry.*, 69 N. Y. 170 (1877); *Burton v. La Duke*, 61 Utah, 78, 210 Pac. 978 (1922), excellent collection of cases.

<sup>50</sup> *Limpus v. London Omnibus Co.*, 1 H. & C. 526, 158 Rep. 993 (1862); *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19 (1890).

<sup>51</sup> *Rounds v. D., L. & W. Ry.*, 64 N. Y. 129, at page 136, 21 Am. Rep. 597 (1876); *Bergman v. Hendrickson*, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47 (1900).

This sometimes permits a recovery in an action for willful tort, where an action based on negligence would be defeated by a plea of contributory negligence. *Wallace v. Merrimack River Nav. Co.*, 134 Mass. 95, 45 Am. Rep. 301 (1883).

See 3 Col. Law Rev. 206, and 20 Col. Law Rev. 489.

<sup>52</sup> The opposite doctrine was declared in *Sleath v. Wilson*, 9 C. & P. 607 (1839), but this has been repudiated in *Storey v. Ashton*, L. R. 4 Q. B. 476 (1869); *Rounds v. D., L. & W. Ry.*, 64 N. Y. 129, at page 136, 21 Am. Rep. 597 (1876); *Stone v. Hills*, 45 Conn. 44, 29 Am.

The principles herein discussed assist in determining the employer's liability for all unauthorized torts of his employees, except fraud. The scope of authority of an employee as to tort liability, determined by the "motivation-deviation" tests, varies obviously from the scope of an employee as to contract liability, determined by the P. A. T. rules. The difference is the reasonable result of the different social policies back of the imposition of the two types of liability.

Rep. 635 (1877); FIREMEN'S FUND INS. CO. v. SCHREIBER, 150 Wis. 42, 135 N. W. 507, 45 L. R. A. (N. S.) 314, Ann. Cas. 1913E, 823, Powell, Cas. Agency, 74 (1912).

The old doctrine still finds expression in the so-called "dangerous implement" doctrine. See Horack, 26 Yale Law J. 224.

An attempt has been made to have an automobile declared a dangerous instrument within this doctrine. This has been generally unsuccessful. See 33 Harv. Law Rev. 714; 14 Mich. Law Rev. 82. And cf. Union Trust Co. v. American Com. Car Co., 219 Mich. 557, 189 N. W. 23 (1922).

## CHAPTER VI

### AUTHORITY AND POWER OF AN AGENT TO BIND HIS PRINCIPAL BY FRAUD

39. Recapitulation of Tort Rules as to Fraud.
40. Scienter and Vicarious Liability in Fraud.
41. Scope in Fraud.
42. Fraud Not for the Principal's Benefit.

### RECAPITULATION OF TORT RULES AS TO FRAUD

39. Jurisdictions differ as to the requirements of scienter.

In actions seeking rescission, or in a defense of fraud interposed to an action on contract, scienter does not need to be proved.

In the fields thus far considered it has been relatively easy to divorce the problem of whether P. is rendered liable by A.'s contract or tort from the problem of whether a contract has been negotiated or a tort committed by A. Our problem in agency has been largely separable from the substantive law of torts or contracts. This is not true in the field of fraud, and it is therefore necessary to preface the discussion of our real problem by a brief recapitulation of the law of fraud when no problem of vicarious liability is involved.

The elements establishing fraud differ according to the manner in which the question is raised in court. It may be raised in three ways:

- (1) X. sues Y. for breach of contract. Y. interposes as a defense that the contract was induced by the fraud of X.<sup>1</sup>
- (2) The contract having been induced by what Y. con-

<sup>1</sup> *Outcault Adv. Co. v. Smalley*, 101 Kan. 645, 168 Pac. 677 (1917); *Cumberland, etc., Bakeries v. Lawson*, 91 W. Va. 245, 112 S. E. 568 (1922); *Sioux City Tire & Mfg. Co. v. Harris*, 190 N. W. 142 (Iowa, 1922).

siders the fraud of X., Y. brings an equitable action to rescind.<sup>2</sup>

(3) Y.'s conduct having been induced by what Y. considers fraud, Y. brings a case action for damages against the one whom he believes guilty of fraud.<sup>3</sup>

In all three of these cases it is necessary for Y. to establish that the one charged with fraud made representations as to material facts, which representations were untrue in fact and were made to induce Y. to act thereon, and that Y. did act in reliance thereon to his damage. But all of this might be admitted or proved, and the misrepresentation still be innocent; i. e., it might have been made either in the belief that it was true, or without any knowledge of or belief in its falsity. Such an innocent misrepresentation is sufficient to constitute a defense to a law action for breach of contract,<sup>4</sup> or to base an equitable action for rescission,<sup>5</sup> but is not sufficient to base a law action for damages in any jurisdiction.<sup>6</sup> There are three distinct views

<sup>2</sup> *Manes v. J. I. Case Threshing Machine Co.*, 241 S. W. 757 (Tex. Civ. App. 1922); *J. C. Miller Estate v. Drury*, 120 Wash. 628, 208 Pac. 77 (1922).

The same question is presented if a defendant demands rescission for fraud when sued on the contract. *Pitcher v. Webber*, 103 Me. 101, 68 Atl. 593 (1907).

<sup>3</sup> *Downey v. Finucane*, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 307 (1912); *Deyo v. Hudson*, 174 App. Div. 746, 161 N. Y. Supp. 494 (1916).

The same questions are presented if a defendant interposes as a counterclaim a cause of action based on fraud. *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30 (1865).

See distinction in proof required between an action for breach of warranty and an action for fraud. *Wimple v. Patterson*, 117 S. W. 1034 (Tex. Civ. App. 1909).

<sup>4</sup> *BLOOMQUIST v. FARSON*, 222 N. Y. 375, 118 N. E. 855, Powell, Cas. Agency, 92 (1918); *Bates v. Cashman*, 230 Mass. 167, 119 N. E. 663 (1918); *Gilon v. Morris*, 90 N. J. Eq. 65, 105 Atl. 455 (1918); *Bankers' Utilities Co., Inc., v. Cotton, etc., Trust Co.*, 152 Ark. 135, 237 S. W. 707 (1922); 27 Yale Law J. 929; 28 Yale Law J. 178, 693.

<sup>5</sup> *BLOOMQUIST v. FARSON*, 222 N. Y. 375, 118 N. E. 855, Powell, Cas. Agency, 92 (1918); 17 Col. Law Rev. 436.

<sup>6</sup> *Griswold v. Gebbie*, 126 Pa. 353, 17 Atl. 673, 12 Am. St. Rep. 878

as to what further must be proved to make out such a cause of action. Some jurisdictions require the plaintiff to show that the defendant knew the statement to be false when he made it, or that the defendant made the statement recklessly, not caring whether it be true or false.<sup>7</sup> In others the plaintiff need only show that the defendant had no reasonable ground for believing it to be true when he made it.<sup>8</sup> Still a third group requires only that the plaintiff show that the defendant made the statement as of his own knowledge, when he had only a belief as to its truth.<sup>9</sup> Obviously the first view imposes fraud liability on fewer defendants than either of the other two, while the second rule holds less defendants than the third.

#### SCIENTER AND VICARIOUS LIABILITY IN FRAUD

##### 40. Imposition of vicarious liability for fraud depends in part upon compliance with the jurisdictional requirements as to scienter.

Thus, in considering the authority and power of an agent to bind his principal by fraud, if the question of fraud is raised as a defense to a law action brought by P. against T., or as the basis of a rescission action brought by T. against P., the only question we must be able to answer is whether the making of the representation was

(1889); *Herold v. Pioneer Trust Co.*, 211 Mo. App. 194, 242 S. W. 124 (1922).

<sup>7</sup> *Derry v. Peek*, L. R. 14 A. C. 337 (1889); *Reno v. Bull*, 226 N. Y. 546, 124 N. E. 144 (1919).

<sup>8</sup> Compiled Laws N. D. 1913, § 5944: "2. The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true is deceit." Similar statutes exist in California, Montana, and South Dakota.

<sup>9</sup> *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313 (1869); *Lynch v. Mercantile Trust Co.*, 18 Fed. 486 (C. C. 1883); *Matteson v. Rice*, 116 Wis. 328, 92 N. W. 1109 (1903).

within the scope of authority of A.; but, if the question of fraud is raised in a law action for damages brought by T. against P., we must consider, in addition to the "scope" question, the further inquiry as to whether that jurisdiction's requirement as to scienter has been met. If P. is proved to have actually authorized A. to make specific statements which he (P) knew to be false, scienter is made out, although A. honestly believed the statements to be true.<sup>10</sup> If A. is proved to have known the falsity of the statements which he made, the scienter requirement is satisfied, regardless of whether P. knew that the representations were made, or knew the statements so made to be false.<sup>11</sup> If P., knowing that certain facts exist, hires an agent ignorant of those facts, in order to have such agent innocently misrepresent the facts, although P. does not instruct him to make the specific statements, still P. is liable.<sup>12</sup> P. is said to have fraudulently withheld the facts in such a case. But in

<sup>10</sup> CORNFOOT v. FOWKE, 6 M. & W. 358, at page 371, 151 Rep. 450, Powell, Cas. Agency, 94 (1840); Cerriglio v. Pettit, 113 Va. 533, 15 S. E. 303 (1912).

<sup>11</sup> In these cases P. is held liable, although personally free from moral guilt. Jeffrey v. Bigelow, 13 Wend. 518, 28 Am. Dec. 476 (N. Y. 1835); White v. Sawyer, 82 Mass. (16 Gray) 586 (1860); Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259 (1867); Rhoda v. Annis, 75 Me. 17, 46 Am. Rep. 354 (1883); Downey v. Finucane, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 307 (1912); Moynes v. Applebaum, 218 Mich. 198, 187 N. W. 241 (1922).

Contra, holding that P. cannot be held in a case action for damages, although A. made representations within the scope of his authority, knowing them to be false. In such a case the defrauded person may rescind as against P., and recover in fraud as against A. Udell v. Atherton, 7 H. & N. 172, 158 Rep. 437 (1861); Kennedy v. McKay, 43 N. J. Law, 288, 39 Am. Rep. 581 (1881); Decker v. Fredericks, 47 N. J. Law, 469, 1 Atl. 470 (1885).

Cf. explanation of these cases in City Nat. Bank v. Dun, 51 Fed. 160 (C. C. 1892); Keefe v. Sholl, 181 Pa. 90, 37 Atl. 116 (1897); Mick v. Royal Exch. Assur., 87 N. J. Law, 607, 91 Atl. 102, 52 L. R. A. (N. S.) 1074 (1914).

<sup>12</sup> CORNFOOT v. FOWKE, 6 M. & W. 358, at pages 370, 372, 374, 151 Rep. 450, Powell, Cas. Agency, 94 (1840).

the absence of such culpability of P. it would be quite possible to have a case where the making of the representation is concededly within A.'s scope, but it is established that A. made the representation believing it to be true, and that, while P. did not know the representation was made, he did know the facts to be exactly contrary to the representation made by A.<sup>13</sup> In a jurisdiction requiring the "wicked mind," is P. liable in fraud in such a case? There have not been sufficient cases on this question to make any statement confidently, but it is the reviser's view that P. should be held in such a case. This constitutes somewhat of a departure from the requirement of the "wicked mind," but has been justified under the fiction of the "composite mind."<sup>14</sup> P. and A. are regarded as a unit for the purpose of ascertaining whether the scienter requirement is satisfied. Once this requirement has been met in any of the ways hereinbefore indicated, the only agency question in-

<sup>13</sup> CORNFOOT v. FOWKE, 6 M. & W. 358, at page 371, 151 Rep. 450, Powell, Cas. Agency, 94 (1840): "I think it impossible to sustain a charge of fraud when neither principal nor agent has committed any; the principal because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor ever directed the agent to make it; and the agent because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer bona fide."

The doctrine of CORNFOOT v. FOWKE has been questioned many times. Willes, J., in Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259 (1867), at page 262, said: "I should be sorry to have it supposed that CORNFOOT v. FOWKE turned upon anything but a point of pleading." See, also, criticism of the case in FITZSIMMONS v. JOSLIN, 21 Vt. 129, at page 140, 52 Am. Dec. 46, Powell, Cas. Agency, 97 (1849). Cf. Matteson v. Rice, 116 Wis. 328, 92 N. W. 1109 (1903).

<sup>14</sup> "In an action between vendor and vendee, knowledge possessed by either the principal or the agent is, respectively, imputable to each other." Ruger, C. J., in Mayer v. Dean, 115 N. Y. 556, at page 561, 22 N. E. 261, 5 L. R. A. 540 (1889).

Cf. Fitch Cornell & Co. v. Atchison, T. & S. F. R. Co., 170 App. Div. 222, 155 N. Y. Supp. 1079 (1915).

See criticism of this view by Holmes, 5 Harv. Law Rev. 1, at page 18.

volved is: Was this representation within the scope of A.? We must ascertain some means for determining the limits of that scope.

### SCOPE IN FRAUD

41. The scope of an agent's authority and power to bind his principal in fraud is determined by the P. A. T. rules, and not by the "motivation-deviation" tests.

The commission of fraud is a tort, but the scope of an agent as to fraud is not governed by the principles which we have found determinative as to other torts. One does not normally permit himself to be run over by X.'s chauffeur or truck driver, in reliance on the appearance of authority created by X. intrusting his automobile or truck to that driver. Reliance upon appearances has no proper place in the ascertainment of scope in most torts. Such reliance is normal and proper in dealing with an agent in the negotiation of a contract, and it is in the course of such negotiation that fraudulent representations are usually made. Thus, while many cases have declared in the past, and some recent cases still declare that the scope of an agent to bind his principal in fraud is determined in the same manner as his scope as to other torts, the present tendency seems to be clearly in favor of determining an agent's scope in fraud by the same tests that we have discussed and found controlling as to an agent's scope in contract.<sup>15</sup>

Thus the making of a particular representation by A. may bind P. in fraud, if the making of that representation (1) is actually authorized by P.; or (2) is within the field as to which P. has told T. that A. is authorized to make representations;<sup>16</sup> or (3) is within the field as to which P.

<sup>15</sup> *Weir v. Bell*, L. R. 3 Exch. Div. 238, at page 244 (1878), and cases cited infra, footnotes 24-34, pp. 118-120.

<sup>16</sup> "It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the principal,

has told A. to tell T. that he (A.) is authorized to make representations.<sup>17</sup> All of the considerations heretofore discussed in chapters II and III control the interpretation and application of these three rules. Thus A.'s actual authorization is to be interpreted as including all usual and customary means for the accomplishment of the end authorized,<sup>18</sup> the functions of usage and custom, instructions,<sup>19</sup> notice to T. of limitations on A.'s authority,<sup>20</sup> and the rules of construc-

or that he gave his agent general authority to commit wrongs or frauds." Mackay v. Commercial Bank of New Brunswick, L. R. 5 P. C. 394, at page 410 (1874).

"It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts." Id. at page 412.

See HASKELL v. STARBOARD, 152 Mass. 117, 142 N. E. 695, 23 Am. St. Rep. 809, Powell, Cas. Agency, 98 (1890); McNeile v. Cridland, 168 Pa. 16, 31 Atl. 939 (1895); Matteson v. Rice, 116 Wis. 328, 92 N. W. 1109 (1903); Downey v. Finucane, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 307 (1912); Deyo v. Hudson, 174 App. Div. 746, 161 N. Y. Supp. 494 (1916).

Cf. Wigmore on Evidence, § 1070.

<sup>17</sup> O'Daniel v. Streeby, 77 Wash. 414, 137 Pac. 1025, L. R. A. 1915F, 634 (1914).

<sup>18</sup> Mayer v. Dean, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540 (1889); Griswold v. Gebbie, 126 Pa. 353, 17 Atl. 673, 12 Am. St. Rep. 878 (1889); Busch v. Wilcox, 82 Mich. 315, 46 N. W. 940 (1890).

<sup>19</sup> McNeile v. Cridland, 168 Pa. 16, 31 Atl. 939 (1895).

The distinction between general and special agents is likewise immaterial. In HASKELL v. STARBOARD, 152 Mass. 117, at page 120, 142 N. E. 695, 23 Am. St. Rep. 809, Powell, Cas. Agency, 98 (1890), Judge Devens said: "The defendant contends that Rockwell was a special agent only, and that, as his authority extended only to the sale of the single tract of land, the defendant is not responsible for any representations Rockwell might have made which he did not authorize. But \* \* \* there is no distinction in the matter of responsibility for the fraud of an agent authorized to do business generally and of an agent employed to conduct a single transaction, if in either case he is acting in the business for which he was employed by the principal and had full authority to complete the transaction."

See, also, Haynor Mfg. Co. v. Davis, 147 N. C. 267, 61 S. E. 54, 17 L. R. A. (N. S.) 193 (1908).

<sup>20</sup> Manhattan Life Ins. Co. v. Forty-Second, etc., R. R. Co., 139 N. Y. 146, 34 N. E. 776 (1893); Am. Exch. Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 N. E. 107 (1909); International Text-Book Co. v. Martin, 221 Mass. 1, 108 N. E. 469 (1915).

tion<sup>21</sup> are the same in determining fraud scope as we have found them in contract cases.

### FRAUD NOT FOR THE PRINCIPAL'S BENEFIT

42. To hold P. for A.'s fraud it is not necessary that A. should have been seeking to benefit P. in the making of the misrepresentation. In New York and some other jurisdictions, an agent can increase the scope of his apparent authority by a representation as to a fact peculiarly within his own knowledge, upon which the scope of his apparent authority depends.

Two problems which frequently combine in a single case deserve special treatment: (1) Is it necessary to charge P., that the fraud be committed for his benefit? (2) To what extent can A., by representations as to his own authority, increase his power to bind P. in fraud? The then state of authority doubtless justified the statement in the first edition of this book that "in England it is clearly established that, to make the principal liable, the fraud must be committed by the agent, not merely in the course of the employment, but must be for the benefit of the principal."<sup>22</sup> Since that time, the House of Lords has expressly overruled British Mutual Banking Co. v. Charnwood Forest Ry.<sup>23</sup> in its decision of Lloyd v. Grace, Smith & Co.,<sup>24</sup> and it is now settled in England that the liability of P. for the fraud of A. is in no way dependent upon whether the fraud

<sup>21</sup> O'Daniel v. Streeby, 77 Wash. 414, 137 P. 1025, L. R. A. 1915F, 634 (1914).

<sup>22</sup> Tiffany on Agency (1st Ed.) p. 288. The authorities cited in support of this statement in the text were, among others, British Mutual Banking Co. v. Charnwood Forest Ry., 18 Q. B. D. 714 (1887), and Bowstead, Dig. Ag. art. 100.

<sup>23</sup> 18 Q. B. D. 714 (1887).

<sup>24</sup> LLOYD v. GRACE, SMITH & CO., [1912] A. C. 716, Powell, Cas. Agency, 102, and comment thereon in 26 Harv. Law Rev. 449.

is committed for P.'s benefit or not.<sup>25</sup> This change is the result of a realization that the liability of P. for A.'s fraud differs from the liability of P. for A.'s other torts. The motivation test is not suited to this field of vicarious liability.<sup>26</sup>

The American cases fall into three groups. The simplest of these is illustrated by *Greenough v. U. S. Life Ins. Co.*,<sup>27</sup> where an agent representing an insurance company had the power, but not the authority, to require a \$1,000 cash deposit from subagents as a condition precedent to employment. He represented that such deposit was required of all subagents. This representation was known by A. to be false, and was obviously made not for the benefit of P., as A. promptly disappeared with the cash after receiving it. The court said it could not find that the agent had made the representation and received the money "in part" for the protection of his principal. Such a conclusion would be "purely conjectural." The court said: "While in most cases, where the principal has been held liable for the fraud of his agent, the principal was benefited by such fraud, it by no means follows that the principal is not liable when the fraud is not committed for his benefit."<sup>28</sup> The judgment for the plaintiff in fraud was affirmed. This case represents the weight of authority.<sup>29</sup>

The second type of case is where the agent has authority to furnish information in answer to inquiries, and fraudulently furnishes false information for his own benefit, or for the benefit of some person other than P. This exact question has been seldom adjudicated, but in one case the local agents of a mercantile agency knowingly gave false

<sup>25</sup> Bowstead, *Agency* (1919) § 105, and case *supra*.

<sup>26</sup> 26 Harv. Law Rev. 449.

<sup>27</sup> 96 Vt. 47, 117 Atl. 332 (1922).

<sup>28</sup> 96 Vt. 47, 117 Atl. 332, at page 334 (1922).

<sup>29</sup> *Mick v. Royal Exch. Assur. Co.*, 87 N. J. Law, 607, 91 Atl. 102, 52 L. R. A. (N. S.) 1074 (1914); 18 Harv. Law Rev. 144.

Cf. *Gibraltar Realty Co. v. Security Trust Co.*, 136 N. E. 636 (Ind. Sup. 1922).

information concerning the standing of a merchant, with intent to mislead the plaintiff and to benefit the merchant. The mercantile agency was held liable for the fraud,<sup>30</sup> but the decision was reversed,<sup>31</sup> apparently on other grounds. The liability of P. in such a case would seem proper.

In the third type of case the agent has authority to do an act in the event of the existence of some extrinsic fact resting peculiarly within his knowledge, and for his own benefit or the benefit of some person other than the principal, does the act, knowing that the fact does not exist.<sup>32</sup> The liability of P. in contract under these circumstances has been heretofore discussed.<sup>33</sup> We found in that connection that some jurisdictions hold that T. under these circumstances is entitled to rely upon either the express or implicit representation of A. that such extrinsic fact exists, and hence that a contract exists by the objective theory of contracts, or that P. is estopped to deny the existence of a contract according to the estoppel doctrine. The cases in some jurisdictions similarly hold that the making of the representation is objectively, or by estoppel, within the power of A., and that P. is bound in fraud to one who has relied upon the representation.<sup>34</sup> Both of these explanations of the

<sup>30</sup> City Nat. Bank v. Dun, 51 Fed. 160 (C. C. 1892).

<sup>31</sup> Dun v. City Nat. Bank, 58 Fed. 174, 7 C. C. A. 152, 23 L. R. A. 687 (1893).

<sup>32</sup> N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30 (1865).

<sup>33</sup> See section 17, supra.

<sup>34</sup> In N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30, at pages 66 to 73 (1865), this topic is fully discussed. In this case an officer of the railroad corporation charged by the by-laws of the corporation with the duty of issuing new stock certificates for money received and of issuing certificates in lieu of old certificates surrendered for cancellation, issued many certificates for which he received neither cash nor other certificates for cancellation. The total number of shares for which certificates were outstanding exceeded the authorized capitalization of the corporation. Many persons holding such certificates as owners or for collateral started suits against the railroad company to recover for the loss occasioned by the fraud of this agent. The railroad company started an action in equity enjoining all of the holders of such certificates as defendants. The several de-

rule are advanced in *N. Y. & N. H. R. R. Co. v. Schuyler*.<sup>35</sup> It is frequently necessary to sue in fraud, rather than in contract, because of limitations placed by the charter upon the contractual powers of the corporation,<sup>36</sup> or because there is no contract upon which an action can be brought.<sup>37</sup> The acceptance of the doctrine of the Schuyler Case de-

fendants filed counterclaims in fraud and were allowed to recover on the ground that third persons were entitled to rely upon the representation made by the agent that he had received other certificates for cancellation, which representation was implicit in his issuance of such certificates and related to an extrinsic fact peculiarly within his knowledge.

"The ground of liability is not that the principal has been benefited by the act of the agent, but that an innocent third person has been damaged by confiding in the agent, who was accredited by the principal as worthy of trust in that particular business." *Tome v. Parkersburg R. R. Co.*, 39 Md. 36, at page 76, 17 Am. Rep. 540 (1873).

See, also, *Allen v. South Boston Ry.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185 (1889); *Farrington v. South Boston Ry.*, 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222 (1890); *Kisterbock's Appeal*, 127 Pa. 601, 18 Atl. 381, 14 Am. St. Rep. 868 (1889); *Fifth Ave. Bank v. Forty-Second St., etc., Ry. Co.*, 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712 (1893). Contra: *Moores v. Bank*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385 (1884).

Some cases in New York have raised a question as to the full validity of the Schuyler Case in recent years. These cases are: *Bank of N. Y. v. Amer. Dock & Trust Co.*, 143 N. Y. 559, 38 N. E. 713 (1894); *Amer. Exch. Nat. Bank v. Woodlawn Cemetery*, 194 N. Y. 116, 87 N. E. 107 (1909), and comment thereon in 22 Harv. Law Rev. 526. These doubts would seem to be allayed by *Hudson Trust Co. v. American Linseed Co.*, 232 N. Y. 350, 134 N. E. 178 (1922).

See, generally, 4 Col. Law Rev. 368; 13 Col. Law Rev. 640; 4 Mich. Law Rev. 464.

<sup>35</sup> *Estoppel*, at page 61; objectively within A.'s power, at page 64. Contra: *Friedlander v. Railway Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991 (1889).

<sup>36</sup> *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, at page 49 (1865); *Allen v. South Boston R. R. Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185 (1889).

It is also possible in some cases to recover greater damages in a fraud action than in a contract action. *Jeffrey v. Bigelow & Tracy*, 13 Wend. 518, at page 523, 28 Am. Dec. 476 (N. Y. 1835).

<sup>37</sup> *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354 (1883); *Deyo v. Hudson*, 174 App. Div. 746, 161 N. Y. Supp. 494 (1916).

pends upon a willingness to permit A. within certain limits to expand the scope of his authority by his own representations.<sup>38</sup>

<sup>38</sup> Cf. Ewart's Doctrine of "Estoppel by Assisted Misrepresentation," 2 Col. Law Rev. 223, at page 229; Ewart on Estoppel, pp. 20, 21.

## CHAPTER VII

### THE AUTHORITY AND POWER OF AN AGENT TO IMPOSE UPON HIS PRINCIPAL RESPONSIBILITY FOR CRIME

43. Authority.

44. Power.

#### AUTHORITY

43. Normally, the principal is not criminally liable for crimes of his agent, unless he has actually previously authorized or assented to the criminal act of the agent.

A distinction between the civil and criminal liability of a principal for the criminal acts of his agent is necessary. P.'s civil liability for such acts of A. is determined by whether the act of A. is within the authority or power of A. to bind P. in tort.<sup>1</sup> Thus, although A.'s criminal act was unauthorized or even forbidden by P., still P. may be civilly liable therefor, if it was within the scope of A.'s authority or power to bind P. in tort.<sup>2</sup> The law imposes a much more restricted criminal liability. If P. has previously authorized or assented to A.'s criminal act, P. is also punishable for the crime committed by A.;<sup>3</sup> but, in the absence of such authorization or assent, P. is not so punishable.

<sup>1</sup> Ante, chapters V and VI.

<sup>2</sup> Commonwealth v. Nichols, 51 Mass. (10 Metc.) 259, 43 Am. Dec. 432 (1845); George v. Gobey, 128 Mass. 289, 35 Am. Rep. 376 (1880); COMMONWEALTH v. BRIANT, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707, Powell, Cas. Agency, 110 (1886); Foy v. United Rys. Co. of St. Louis, 243 S. W. 185 (Mo. App. 1922).

<sup>3</sup> Maxey v. U. S., 30 App. D. C. 63 (1907); Richardson v. U. S., 181 Fed. 1, 104 C. C. A. 69 (1910); State v. Penn. Ry. Co., 84 N. J. Law, 550, at page 554, 87 Atl. 86 (1913); PEOPLE v. KOWALSKI, 179 Mich. 371, 146 N. W. 177, Powell, Cas. Agency, 109 (1914); Merritt v. U. S., 264 Fed. 870 (C. C. A. 1920); Thompson v. State, 189 Ind. 182, 125 N. E. 641 (1920); Knight v. Commonwealth, 194 Ky. 563, 240 S. W. 40 (1922); Nobile v. U. S., 284 Fed. 253 (C. C. A. 1922).

able, as a general rule.<sup>4</sup> He cannot become liable by ratification,<sup>5</sup> nor does the fact that the criminal act was committed by the employee in the course of his employment and for the principal's benefit render the employer liable.<sup>6</sup> Assent is necessary to give the mental element which is a part of most crimes.

### POWER

**44. An agent not previously authorized to commit a crime has a power to impose criminal liability on P.:**

- (1) Where the law has imposed upon P. the obligation to see that his subordinates abstain from designated acts; and
- (2) Where the law has imposed upon P. the obligation to assist in enforcing prohibitive legislation.

It has been found desirable in some fields to require close supervision of subordinates, and this has been accomplished by imposing criminal responsibility upon the principal for violations of prescribed conduct by the principal's agents engaged therein. This has been applied to the proprietor of a publishing house, when his subordinates have published libels,<sup>7</sup> and to proprietors of saloons, when the

<sup>4</sup> MORSE v. STATE, 6 Conn. 9, Powell, Cas. Agency, 114 (1825); Commonwealth v. Nichols, 51 Mass. (10 Metc.) 259, 43 Am. Dec. 432 (1845); COMMONWEALTH v. BRIANT, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707, Powell, Cas. Agency, 110 (1886); Wilson v. State, 64 Ark. 586, 43 S. W. 972 (1898); Rosenbaum v. State, 24 Ind. App. 510, 57 N. E. 156 (1900); MOORE v. STATE, 64 Neb. 557, 90 N. W. 553, Powell, Cas. Agency, 112 (1902); State v. Waxman, 93 N. J. Law, 27, 107 Atl. 150 (1919); People v. Moskowitz, 119 Misc. Rep. 837, 196 N. Y. Supp. 634, at page 637 (1922).

<sup>5</sup> MORSE v. STATE, 6 Conn. 9, Powell, Cas. Agency, 114 (1825).

<sup>6</sup> State v. Bacon, 40 Vt. 456 (1868); COMMONWEALTH v. BRIANT, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707, Powell, Cas.

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<sup>7</sup> It was held that such evidence was practically conclusive on the question of authority, Rex v. Walter, 3 Esp. 21 (1799).

Cf. Rex v. Gutch, 1 Moody & M. 433 (1829).

By St. 6 & 7 Vict. c. 96, the accused may show that the publication was unauthorized and was not due to want of care.

bartender has sold liquor at forbidden times<sup>8</sup> or to forbidden persons.<sup>9</sup> In one of the libel cases it was said that the doing of the act upon the premises of the principal by a person generally acting as his servant or agent gives *prima facie* evidence of publication by the defendant.<sup>10</sup> These facts would seem to be evidence from which a jury might draw such an inference; but, whatever the weight of such evidence, unless it were made conclusive by statute, the defendant should be allowed to show in defense that the act was in fact unauthorized.<sup>11</sup> The lack of authority or prohibition by P. to A. must be real, and not merely colorable. Thus P. may be liable, although he many times directed A. not to do a given act, if P. and A. really understood that P. desired A. to do it.<sup>12</sup> To the extent, therefore, that such inference justifies holding P. criminally, P. is held because of authority conferred on A., and not because of A.'s power to inflict criminal responsibility for an unauthorized act.

In this country the liability of the master in actions for libel has been placed upon the ground of negligence or cul-

Agency, 110 (1886); *Chisholm v. Doulton*, L. R. 22 Q. B. Div. 736, at page 741 (1889); *Commonwealth v. Stevens*, 155 Mass. 291, 29 N. E. 508 (1892).

<sup>8</sup> *Commonwealth v. Nichols*, 51 Mass. (10 Metc.) 259, 43 Am. Dec. 432 (1845).

<sup>9</sup> *Carroll v. State*, 63 Md. 551, 3 Atl. 29 (1885); *Commonwealth v. Stevens*, 155 Mass. 291, 29 N. E. 508 (1892); *State v. McCance*, 110 Mo. 398, 19 S. W. 648 (1892); *STATE v. LUNDGREN*, 124 Minn. 162, 144 N. W. 752, Ann. Cas. 1915B, 377, Powell, Cas. Agency, 115 (1913).

<sup>10</sup> *Rex v. Almon*, 5 Burr. 2686, 98 Rep. 411 (1770). This decision was changed by later cases (see footnote 7, p. —) to a conclusive presumption, but the rule of the principal case seems to have been restored by St. 6 & 7 Vict. c. 96. See *Commonwealth v. Morgan*, 107 Mass. 199, at page 202 (1871).

<sup>11</sup> *Commonwealth v. Nichols*, 51 Mass. (10 Metc.) 259, 43 Am. Dec. 432 (1845); *Barnes v. State*, 19 Conn. 398 (1849); *State v. McCance*, 110 Mo. 398, 19 S. W. 648 (1892); *Knight v. Commonwealth*, 194 Ky. 563, 240 S. W. 40 (1922).

<sup>12</sup> *Anderson v. State*, 22 Ohio St. 305 (1872); *State v. Mueller*, 38 Minn. 497, 38 N. W. 691 (1888); *MOORE v. STATE*, 64 Neb. 557, 90 N. W. 553, Powell, Cas. Agency, 112 (1902).

Cf. *Mignery v. State*, 10 Ohio App. 232 (1917).

pable neglect to exercise proper care and supervision over persons in his employ. It is therefore open to him in defense to show that the publication was made under such circumstances as to negative any inference of privity, connivance, or want of ordinary care, as by showing that he was absent, or confined by sickness, and unable to exercise proper care and supervision.<sup>13</sup> So, also, in cases of nuisance, a large responsibility has been recognized. Liability in such cases may sometimes rest on the ground of responsibility for the reasonable and natural consequence of acts commanded—responsibility which attaches even when the relation is that of employer and independent contractor.<sup>14</sup>

But in many cases A. has a power to impose criminal responsibility where no neglect is shown. This is because of statutory enactments placing the burden of violations by agents upon the head of the enterprise.<sup>15</sup> Most of these statutes are prohibitory enactments seeking to prevent practices regarded as socially undesirable, such as the permitting of games of chance,<sup>16</sup> the sale of liquor on Sunday,<sup>17</sup> or to minors,<sup>18</sup> or to intoxicated persons,<sup>19</sup> and, since the prohibition legislation, the sale<sup>20</sup> or possession of liq-

<sup>13</sup> Commonwealth v. Morgan, 107 Mass. 199 (1871), semble.

<sup>14</sup> King v. Dixon, 3 Moore & S. 11, 105 Rep. 516 (1814); Rex v. Medley, 6 Car. & P. 292 (1834); Queen v. Stephens, L. R. 1 Q. B. 702 (1866).

<sup>15</sup> Noecker v. People, 91 Ill. 494 (1879); Carroll v. State, 63 Md. 551, 3 Atl. 29 (1885); Commonwealth v. Kelley, 140 Mass. 441, 5 N. E. 834 (1886); STATE v. KITTELLE, 110 N. C. 560, 15 S. E. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698, Powell, Cas. Agency, 117 (1892), very complete collection of cases; Lehman v. District of Columbia, 19 App. D. C. 217, at page 233ff (1902); Mignery v. State, 10 Ohio App. 232 (1917).

<sup>16</sup> Redgate v. Haynes, L. R. 1 Q. B. Div. 89 (1876).

<sup>17</sup> People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270 (1884).

<sup>18</sup> Boatright v. State, 77 Ga. 717 (1886); State v. McCance, 110 Mo. 398, 19 S. W. 648 (1892); STATE v. KITTELLE, 110 N. C. 560, 15 S. E. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698, Powell, Cas. Agency, 117 (1892).

<sup>19</sup> People v. Longwell, 120 Mich. 311, 79 N. W. 484 (1899).

<sup>20</sup> Thompson v. State, 189 Ind. 182, 125 N. E. 641 (1920).

uor for sale,<sup>21</sup> or the use of unwholesome ingredients in food.<sup>22</sup> The imposition of criminal responsibility upon the principal for the violations committed by agents, without the knowledge or contrary to the directions of the principal, can only be justified as a stringent measure to compel such persons to see to it at their peril that the prohibited acts are not committed by agents under the general control of such principal.<sup>23</sup>

There is much conflict, real or apparent, in the decisions, and different constructions have been placed by different courts upon similar enactments.<sup>24</sup> The question in each case is whether the Legislature intended to place upon designated persons the duty of assisting in their respective fields of activity, in enforcing the prohibitive legislation. When such intention is ascertained, the statute is valid, and P. is subject to vicarious criminal liability for acts unauthorized or forbidden.<sup>25</sup>

<sup>21</sup> Hoskins v. Commonwealth, 171 Ky. 204, 188 S. W. 348 (1916). Cf. Young v. Commonwealth, 194 Ky. 561, 239 S. W. 1042 (1922).

<sup>22</sup> King v. Dixon, 3 Moore & S. 11, 103 Rep. 516 (1814).

<sup>23</sup> People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270 (1884); Carroll v. State, 63 Md. 551, 3 Atl. 29 (1885); STATE v. KITTELLE, 110 N. C. 560, at page 565, 15 S. E. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698, Powell, Cas. Agency, 117 (1892), very complete collection of cases; Banks v. City of Sullivan, 78 Ill. App. 298 (1898); Lehman v. District of Columbia, 19 App. D. C. 217, at page 233 ff. (1902); Olson v. State, 143 Wis. 413, 127 N. W. 975 (1910).

<sup>24</sup> State v. McCance, 110 Mo. 398, 19 S. W. 648 (1892).

<sup>25</sup> People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270 (1884); Commonwealth v. Kelley, 140 Mass. 441, 5 N. E. 834 (1886); State v. Denoon, 31 W. Va. 122, 5 S. E. 315 (1888); People v. Longwell, 120 Mich. 311, 79 N. W. 484 (1899); State v. Grant, 20 S. D. 164, 105 N. W. 97, 11 Ann. Cas. 1017 (1905); Olson v. State, 143 Wis. 413, 127 N. W. 975 (1910); STATE v. LUNDGREN, 124 Minn. 162, 144 N. W. 752, Ann. Cas. 1915B, 377, Powell, Cas. Agency, 115 (1913); People v. Schmidt, 292 Ill. 127, 126 N. E. 570 (1920).

Case in which such intent has been found absent from statute:  
Wilson v. State, 64 Ark. 586, 43 S. W. 972 (1898).

## CHAPTER VIII

### RATIFICATION

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### RATIFICATION—GENERAL FUNCTION

45. Ratification is the adoption of an act done by another, who had neither authority nor power to impose liability therefor. Such other person may have been a servant or a stranger. The legal consequences of ratification are, in most particulars, the same as of prior authority.

Authority, actual or apparent, frequently results in the imposition of vicarious liability upon an employer. Such authority is established by facts existing prior to or con-

temporaneous with the act of the servant or agent. Similarly the words or conduct of one individual, subsequent to an act by another individual, may impose liability upon the first person for the act of the second. When such liability is thus imposed, it is said that the ratification relates back and is equivalent or comparable to prior authority.<sup>1</sup> Such adoption may be made by an individual as to an unauthorized contract,<sup>2</sup> tort,<sup>3</sup> or fraudulent representation<sup>4</sup> of an employé<sup>5</sup> or of a stranger,<sup>6</sup> who stood in no representative relation to the adopting individual at the time of the act.

The topic of ratification may be divided into four problems. First, what acts may be ratified?<sup>7</sup> Second, assuming that the act is of such a nature that it is capable of ratification, what other facts as to A.'s conduct and as to P.'s existence and status must be established to permit P. to ratify if he so desires?<sup>8</sup> Third, assuming all of the above requirements are satisfied, what conduct amounts to ratification?<sup>9</sup> Fourth, assuming that the three questions

<sup>1</sup> The Latin maxim has two forms. In Bracton *de Legibus*, f. 171b, it is said: "Ratihabitio in hoc casu comparatur mandato." This means that ratification is similar or comparable to a command. In Co. Lit. 207a, we find: "Omnis ratihabitio retrotrahitur et mandato æquiparatur," or "All ratification relates back and is equivalent to a command."

This difference is, perhaps, not significant, but in view of the many particulars in which ratification has different legal consequences from those flowing from prior authority, the use of the word "comparatur" would seem preferable to the greater identity signified by "æquiparatur." See Story, *Agency*, § 239, and Wambaugh, 9 Harv. Law Rev. 60.

<sup>2</sup> *Montwil v. American Locomotive Co.*, 173 App. Div. 387, 159 N. Y. Supp. 21 (1916).

<sup>3</sup> *Crockett Bros. v. Sibley*, 3 Ga. App. 554, 60 S. E. 326 (1908); *Drake v. Metropolitan Mfg. Co.*, 218 Mass. 112, 105 N. E. 634 (1914).

<sup>4</sup> *Amazon Fire Ins. Co. v. Bond*, 65 Okl. 224, 165 Pac. 414 (1917).

<sup>5</sup> *Penn. Iron Works Co. v. Vogt Machine Co.*, 139 Ky. 497, 96 S. W. 551, 8 L. R. A. (N. S.) 1023, 139 Am. St. Rep. 504 (1916).

<sup>6</sup> *Greenfield Bank v. Crafts*, 86 Mass. (4 Allen) 447, at page 454 (1862); *Ramsay v. Miller*, 202 N. Y. 72, 95 N. E. 35 (1911).

<sup>7</sup> See sections 46, 47, infra.

<sup>8</sup> See sections 48–52, infra.

<sup>9</sup> See sections 53–58, infra.

above are satisfactorily answered, what are the legal consequences of a ratification?<sup>10</sup>

### WHAT ACTS MAY BE RATIFIED—GENERAL

**46.** Every act, lawful or unlawful, done by one person on behalf of another, without prior authority, which is of such a nature that if done pursuant to prior authority it would in law be his act, is capable of ratification by the person on whose behalf it is done.

As a rule every act, lawful or unlawful, which is done on behalf of another without his authority, may be ratified, and, when ratified, is deemed to be his act, with all the burdens and benefits which would have resulted, had he previously authorized it. Inasmuch as a man is liable for a tort, as well as upon a contract, if he has authorized it, he is liable if he ratifies it.<sup>11</sup> On the other hand, it may be that an act would be destitute of legal effect, or void, although performed by an authorized agent, and such an act can, of course, derive no force from ratification. Thus certain acts may not be done by an agent, and these, since they may not be delegated, may not be ratified.<sup>12</sup> Again, the law prohibits, and pronounces void, certain classes of contracts, termed illegal contracts,<sup>13</sup> and these, since they

<sup>10</sup> See sections 59–64, infra.

<sup>11</sup> *Bird v. Brown*, 4 Ex. 786, 154 Rep. 1433 (1850); *Hilbery v. Hatton*, 2 H. & C. 822, 159 Rep. 341 (1864); *DEMPSEY v. CHAMBERS*, 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249; *Powell, Cas. Agency*, 123 (1891); *Nims v. Boys' School*, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467 (1893).

Accepting goods wrongfully seized with knowledge of facts held ratification of assault committed while making seizure. *Avakian v. Noble*, 121 Cal. 216, 53 Pac. 559 (1898).

Accepting proceeds of wrongful sale of goods stored in principal's warehouse rendered him liable for conversion. *Creson v. Ward*, 66 Ark. 209, 49 S. W. 827 (1899).

<sup>12</sup> See section 65, infra.

<sup>13</sup> See section 66, infra.

would be destitute of legal effect by whomsoever entered into, are not the less so if made by an agent whose act was later ratified.<sup>14</sup> Thus, in a jurisdiction where a statute prohibited contracts for the sale of intoxicating liquor, such a contract would be void, whether made by the seller or by an agent, however his authority might be conferred. So, where a statute declares void contracts made in behalf of municipal bodies, in violation of provisions regulating the manner of letting, ratification is unavailing to validate a contract attempted so to be made.<sup>15</sup> Acts which are void cannot be ratified, but acts which are voidable may be.<sup>16</sup> It follows that a contract void for illegality cannot be ratified, although at the time of ratification the act creating the illegality has been repealed.<sup>17</sup> So, too, it would seem, in the case of a contract made by an assumed agent in one jurisdiction and ratified in another, the legality of the contract, and consequently its capability of ratification, de-

<sup>14</sup> *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435 (1850); *UNITED STATES v. GROSSMAYER*, 9 Wall. 72, 19 L. Ed. 627, Powell, Cas. Agency, 126 (U. S. 1869); *Spence v. Cotton Mills*, 115 N. C. 210, 20 S. E. 372 (1894).

Where a statute prohibited any officer of any corporation from being interested in any contract for furnishing supplies to it, an ordinance for supply of water to a municipality by a company of which a majority of the councilmen were directors was void, and could not be ratified by a council none of whose members was a member of the company. *Borough of Milford v. Water Co.*, 124 Pa. 610, 17 Atl. 185, 3 L. R. A. 122 (1889).

<sup>15</sup> *Zottman v. City of San Francisco*, 20 Cal. 96, 81 Am. Dec. 96 (1862); *Jefferson County Sup'r's v. Arrighi*, 54 Miss. 668 (1877).

<sup>16</sup> *State v. Buttles' Ex'r*, 3 Ohio St. 309 (1854); *State v. Shaw*, 28 Iowa, 67 (1869); *State v. Torinus*, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395 (1879); *City of Findlay v. Pertz*, 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188 (1895); *Westerlund v. Black Bear Mining Co.*, 203 Fed. 599, 121 C. C. A. 627 (1913), semble, but excellent collection of cases; *Standard Roller Bearing Co. v. Hess Co.*, 275 Fed. 916 (C. C. A. 1921); *Jessup v. Hinchman*, 133 N. E. 853 (Ind. App. 1922).

<sup>17</sup> A contract with a corporation, which was void because not in writing, or sealed or signed by the corporate officers, as required by statute, could not be ratified, though the statute had been repealed. *Spence v. Cotton Mills*, 115 N. C. 210, 20 S. E. 372 (1894).

pend upon the law of the former jurisdiction; but the decisions are conflicting.<sup>18</sup>

### WHAT ACTS MAY BE RATIFIED—CRIMINAL ACTS

47. Whether an act which involved a crime such as forgery may be ratified by the one personally affected by the crime is a question upon which there is a fairly equal division of authority.

Whether a forged instrument is capable of being ratified by the person whose name is forged, so as to render him liable upon it, is a question upon which the courts are divided.<sup>19</sup> The arguments against ratification are twofold—the first founded upon the circumstance that the forger

<sup>18</sup> *Dord v. Bonnaffee*, 6 La. Ann. 563, 54 Am. Dec. 573 (1851); *Golson v. Ebert*, 52 Mo. 260 (statute of frauds) (1873). "In case of a contract made in a foreign country, by an agent without authority, which the principal at home afterwards ratifies, the contract is considered as made in that foreign country, because the ratification relates back tempore et loco, and is equivalent to an original authority." *Eustis, C. J.*, in *Dord v. Bonnaffee*, *supra*. *Contra*, and probably wrong: *Shuenfeldt v. Junkermann*, 20 Fed. 357 (C. C. 1884).

<sup>19</sup> Against ratification: *Brook v. Hook*, L. R. 6 Ex. 89 (1871); *McHugh v. Schuylkill Co.*, 67 Pa. 391, 5 Am. Rep. 445 (1871); *WORKMAN v. WRIGHT*, 33 Ohio St. 405, 31 Am. Rep. 546, Powell, Cas. Agency, 128 (1878); *Henry v. Heeb*, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613 (1888); *Henry Christian Building & Loan Ass'n v. Walton*, 181 Pa. 201, 37 Atl. 261, 59 Am. St. Rep. 636 (1897); *Shroyer v. Smeltzer*, 38 Pa. Super. Ct. 400 (1909).

A fraudulent alteration of a promissory note cannot be ratified, so as to create liability in favor of the holder who made the alteration. *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754 (1889).

In favor of ratification: *Greenfield Bank v. Crafts*, 86 Mass. (4 Allen) 447 (1862); *Casco Bank v. Keene*, 53 Me. 103 (1865); *Howard v. Duncan*, 3 Lans. 174 (N. Y. 1870); *Wellington v. Jackson*, 121 Mass. 157 (1876); See, also, *McKenzie v. British Linen Co.*, L. R. 6 App. Cas. 82 (1881).

The act of one who obtained payment by falsely representing himself as agent of the creditor might be ratified, though the act was a crime. *Scott v. New Brunswick Bank*, 23 Can. Sup. Ct. 277 (1894).

does not assume to act as agent; the second founded upon public policy.

As we shall see,<sup>20</sup> it is a rule that an act, to be capable of ratification, must be done professedly on behalf of the quasi principal, by one who assumes to act as his agent. But in the case of forgery the forger does not profess to sign for the other, but, in effect, represents the signature to have been made by the person whose signature it purports to be.<sup>21</sup> In answer to this objection it is suggested that although, as a rule, a man may not ratify an act unless it purports to have been done on his behalf by one who assumes to act as his agent, the principle upon which the rule rests is simply that a man may not ratify an act which did not purport to be his act or done on his behalf. Ordinarily, where one man acts for another, he must act for him professedly, or else the act will purport to be his own act, and not the act of him for whom he is secretly acting. But, from the very nature of forgery, the act upon its face purports to be the act of the person whose name is forged, and this, it seems, is a sufficient basis for his adoption of the act. Thus, if a clerk, without authority, but in the honest belief that he had authority, should sign his employer's name to a check, and issue it, without disclosing the fact that the signature was not made by his employer, it can hardly be doubted that the employer could

<sup>20</sup> See section 48, infra.

<sup>21</sup> "In all the cases cited for the plaintiff, the act ratified was an act pretended to have been done for or under the authority of the party sought to be charged; and such would have been the case here, if Jones had pretended to have had the authority of the defendant to put his name to the note, and that he had signed the note for the defendant accordingly, and had thus induced the defendant to take it. In that case, although there had been no previous authority, it would have been competent to the defendant to ratify the act. \* \* \* But here Jones had forged the name of the defendant to the note, and pretended that the signature was the defendant's signature; and there is no instance to be found in the books of such an act being held to have been ratified by a subsequent recognition or statement." *Brook v. Hook*, L. R. 6 Ex. 89, per Kelly, C. B. (1871).

ratify it, although the assumption of agency did not appear.<sup>22</sup> It is submitted that the mere undisclosed intent of the person who makes the signature, although it may make him guilty of forgery, is not a difference which should distinguish the case of forgery from the case last supposed, or which should preclude the person whose signature is forged from ratifying it, unless, indeed, he is precluded on the ground of public policy.<sup>23</sup>

The argument from public policy is based upon the view that ratification of forgery, if it be sanctioned, has a tendency to stifle prosecution for the criminal offense. This tendency cannot be denied,<sup>24</sup> but it may well be doubted whether this consideration should prevail to defeat the ordinary operation of ratification, where the ratification is not upon the understanding that the guilty party shall not

<sup>22</sup> *Merrifield v. Parritt*, 65 Mass. (11 Cush.) 590 (1853); *Gross v. Cohen*, 236 Mass. 468, 128 N. E. 714 (1920); *Flat Top Nat. Bank v. Parsons*, 90 W. Va. 51, 110 S. E. 491 (1922). See cases in footnote 33, p. 137, *infra*.

<sup>23</sup> "As to this objection, it is clear that it cannot be maintained upon the ground of the form of the signatures merely. This form of signature, though not the more usual manner of signing by an agent, does not prevent the person whose name is placed on the note from being legally holden, upon proof that the signature was previously authorized, or subsequently adopted. Various similar cases will be found, where the party has been charged, where the name of the principal appears upon the note accompanied with no indications of the fact of its having been signed by another hand. \* \* \* Wherever such signature by the hand of another was duly authorized, and also where a note was thus executed under an honest belief by the party signing the name that he was thus authorized, we apprehend that there can be no doubt that it would be competent, in the case first stated, to maintain an action upon the same, upon proof of the previous authority thus to sign the name, or in the latter upon proving that the signature, although at the time unauthorized, was subsequently adopted and ratified by the party whose name appears as promisor." *Greenfield Bank v. Crafts*, 86 Mass. (4 Allen) 447, at page 453, per Dewey, J. (1862).

<sup>24</sup> "It is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution." *Henry v. Heeb*, 114 Ind. 275, at page 280, 16 N. E. 606, 5 Am. St. Rep. 613 (1888).

be prosecuted.<sup>25</sup> Of course, ratification could under no circumstances afford a defense to the forgery against an indictment.<sup>26</sup>

Ratification is not to be confounded with estoppel.<sup>27</sup> There is universal agreement that, where a person whose signature has been forged expressly or impliedly represents that it is genuine, he is estopped, as against one who has changed his position for the worse, as by giving value for a negotiable instrument in reliance upon the representation, from denying its genuineness.<sup>28</sup>

#### CONDITIONS PRECEDENT TO RATIFICATION OF AGENCY—ASSUMPTION OF AGENCY

48. In order to be capable of ratification, an act must have been done by one who professed to act as a representative.

Even though an act may be of such a nature that it is capable of ratification, within the principles discussed in the two preceding paragraphs, still there are further facts

<sup>25</sup> "It is, however, urged that public policy forbids sanctioning a ratification of a forged instrument, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted on the criminal offense." *Greenfield Bank v. Crafts*, 86 Mass. (4 Allen) 447 (1862); *Dillon v. Patterson*, 22 Ga. App. 209, 95 S. E. 733 (1918).

<sup>26</sup> *McKenzie v. British Linen Co.*, L. R. 6 App. Cas. 82, at page 99 (1881).

<sup>27</sup> *Metcalf v. Williams*, 144 Mass. 452, at page 454, 11 N. E. 700 (1887); *Woodworth v. School Dist. No. 2*, 92 Wash. 456, 159 Pac. 757 (1916); *Beard v. Herndon*, 84 Okl. 142, 203 Pac. 226 (1921). Cf. *Walker v. Hassler*, 240 S. W. 257 (Mo. App. 1922); *Holmes*, 5 Harv. Law Rev. 1, at page 19.

<sup>28</sup> *Crout v. De Wolf*, 1 R. I. 393 (1850); *Forsyth v. Day*, 46 Me. 176 (1858); *McKenzie v. British Linen Co.*, L. R. 6 App. Cas. 82 (1881); *Rudd v. Matthews*, 79 Ky. 479, 42 Am. Rep. 231 (1881); *Dover v. Pittsburg Oil Co.*, 143 Cal. 501, 77 Pac. 405 (1904).

which must be found before ratification thereof is certain to be allowed.

No act performed by one man can be adopted by another as his own unless it was done professedly on his behalf. In other words, an act, to be capable of ratification, must, as a rule, be done by one who assumes openly to act as agent.<sup>29</sup> In *Wilson v. Tumman*,<sup>30</sup> Tindal, C. J., said: "That an act done for another, by a person not assuming to act for himself, but for such other person, though without any percedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. Such was the precise distinction taken in the Year Book, 7 Hen. IV, fol. 35,<sup>31</sup> that if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority, as bailiff at the time; but if he took it, at the time, as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time." Accordingly, if A. enters into a contract with C., openly assuming to act as the agent of B., B. may ratify it; but, if A. enters into a contract in his own name with C., B. cannot claim the benefit of it by subsequent ratification, nor can A. divest himself of his liability towards C., by procuring a ratifica-

<sup>29</sup> *Wilson v. Tumman*, 6 M. & G. 236, 134 Rep. 879 (1843); *Watson v. Swann*, 11 C. B. (N. S.) 756, 142 Rep. 993 (1862); *Grund v. Van Vleck*, 69 Ill. 479 (1873); *Hamlin v. Sears*, 82 N. Y. 327 (1880); *Mitchell v. Association*, 48 Minn. 278, 51 N. W. 608 (1892); *Rawlings v. Neal*, 126 N. C. 271, 35 S. E. 597, 1 Mich. Law Rev. 140 (1900); *Ilfeld v. Ziegler*, 40 Colo. 401, 91 Pac. 825 (1907); *Flowe v. Hartwick*, 167 N. C. 448, 83 S. E. 841 (1914).

<sup>30</sup> 6 M. & G. 236, at page 242, 134 Rep. 879 (1843).

<sup>31</sup> Y. B. 7 H. IV, 24 pl. 1.

tion from B.<sup>32</sup> It follows that a contract cannot be ratified by an undisclosed principal.<sup>33</sup>

### CONDITIONS PRECEDENT TO RATIFICATION— EXISTENCE OF P. WHEN ACT WAS DONE

49. In order to be capable of ratification, the person later seeking to ratify must have been in existence at the time when the act was done.

The act must be performed on behalf of a quasi principal who is in existence. The most frequent application of this rule arises where the promoters of a proposed corporation enter into a contract on its behalf, intending that

<sup>32</sup> Watson v. Swann, 11 C. B. (N. S.) 756, 142 Rep. 993 (1862); Western Pub. House v. District Tp., 84 Iowa, 101, 50 N. W. 551 (1891); McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421 (1898). Where A. entered into an agreement professedly on behalf of B.'s wife and C., B. could not ratify, so as to give him a right to sue on it jointly with his wife and C. Saunderson v. Griffiths, 5 B. & C. 909, 108 Rep. 338 (1826). "Where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative, unless binding upon the person who signed it, he is bound thereby, and a stranger cannot, by a subsequent ratification, relieve him from that responsibility." Kelner v. Baxter, L. R. 2 C. P. 174, per Erle, C. J. (1866); Scott v. Lord Ebury, L. R. 2 C. P. 255 (1867); Richardson v. Payne, 114 Mass. 429 (1874).

<sup>33</sup> KEIGHLEY v. DURANT, [1901] A. C. 240, Powell, Cas. Agency, 130, reversing Durant v. Roberts, [1900] 1 Q. B. 629; Schlessinger v. Forest Prod. Co., 78 N. J. Law, 637, 76 Atl. 1024, 30 L. R. A. (N. S.) 347, 138 Am. St. Rep. 627 (1910); Brown Realty Co. v. Myers, 89 N. J. Law, 247, 98 Atl. 310 (1916).

See notes on above English cases in 15 H. L. R. 221, and by Joshua Williams in 17 L. Q. R. 205.

See "Ratification by an Undisclosed Principal," by Goddard, 2 Mich. Law Rev. 27-45.

Massachusetts permits such ratification by an undisclosed principal if the agent intended to act for the ratifier. Hayward v. Langmaid, 181 Mass. 426, 63 N. E. 912 (1902); Hixon v. Starr, 242 Mass. 371, 136 N. E. 186 (1922). See notes, 1 Mich. Law Rev. 319, and 22 Col. Law Rev. 465.

the contract shall take effect as its contract after its incorporation. In such case there can be no ratification.<sup>34</sup> The subsequently formed corporation may, indeed, make itself liable by entering into a new contract upon the same terms as the old,<sup>35</sup> or it may make itself liable by accepting the benefits of performance under circumstances which give rise to an implied promise to pay therefor;<sup>36</sup> but such liability does not rest upon ratification and does not relate back.<sup>37</sup> An exception, or an apparent exception, to the rule, is recognized in the case of contracts made on behalf of estates of deceased or bankrupt persons, where the title of the administrator or assignee in bankruptcy for the protection of the estate vests by relation, and the administrator or assignee, though not yet appointed, existing, as it

<sup>34</sup> *Kelner v. Baxter*, L. R. 2 C. P. 174 (1866); *Scott v. Lord Ebury*, L. R. 2 C. P. 255 (1867); *In re EMPRESS ENGINEERING CO.*, L. R. 16 Ch. D. 125, Powell, Cas. Agency, 135 (1880); *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193 (1889); *Natal Land & C. Co. v. Pauline*, etc., Synd., [1904] A. C. 120. *Contra*: *Oakes v. Water Co.*, 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544 (1894), and comment thereon in 8 Harv. Law Rev. 357; *Kline Bros. & Co. v. Royal Ins. Co.*, 192 Fed. 378 (C. C. 1911).

Where a corporation organized pursuant to statute, but before its articles were filed as thereby required, entered into a contract, its subsequent recognition of the contract was a ratification, although the statute declared that a corporation so organized should not commence business before such articles were filed. *WHITNEY v. WYMAN*, 101 U. S. 393, 25 L. Ed. 1050, Powell, Cas. Agency, 300 (1879).

<sup>35</sup> *Howard v. Patent Ivory Co.*, L. R. 38 Ch. D. 156 (1888).

<sup>36</sup> *Low v. Railroad*, 45 N. H. 370 (1864); *Bell's Gap R. Co. v. Cristy*, 79 Pa. 54, 21 Am. Rep. 39 (1875); *Paxton Cattle Co. v. Bank*, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852 (1887); *McARTHUR v. PRINTING CO.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653, Powell, Cas. Agency, 136 (1892); *Com'r's of Lewes v. Breakwater Fisheries Co.*, 117 Atl. 823, at page 829 (Del. Ch. 1922).

<sup>37</sup> Hence, though a contract made on behalf of a contemplated corporation was within the statute of frauds, because by its terms not to be performed within one year, a new contract implied from acceptance of performance by the corporation was not within the statute. *McARTHUR v. PRINTING CO.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653, Powell, Cas. Agency, 136 (1892); see note, 14 Harv. Law Rev. 536.

is said, in contemplation of law, may, when subsequently appointed, ratify the contract.<sup>38</sup>

Although the act must be done professedly on behalf of a principal who exists, he need not be named or even known to the agent. It is enough if he be capable of being ascertained and be described.<sup>39</sup> Thus a policy of insurance effected on a vessel on behalf of all persons interested may be ratified by any person who in fact was interested.<sup>40</sup> So a contract made on behalf of the heirs of A., or the administrator of A.'s estate, though the heirs or administrator be unknown to the person assuming to act on their behalf, may be ratified by them.<sup>41</sup>

#### CONDITIONS PRECEDENT TO RATIFICATION— WHO MAY RATIFY

50. Any person who would have been competent to authorize an act, performed in his behalf, when it was performed, and who would still be competent to authorize it, may ratify it.

A person may ratify any act which he would have been competent to authorize, provided he be still competent.<sup>42</sup>

<sup>38</sup> Foster v. Bates, 12 M. & W. 226, 152 Rep. 1180 (1843).

<sup>39</sup> Watson v. Swann, 11 C. B. (N. S.) 756, 142 Rep. 993 (1862).

<sup>40</sup> Hagedorn v. Oliversen, 2 M. & S. 485, 105 Rep. 461 (1814).

<sup>41</sup> Foster v. Bates, 12 M. & W. 226, 152 Rep. 1180 (1843); Lyell v. Kennedy, L. R. 14 App. Cas. 437 (1889).

<sup>42</sup> Marsh v. Fulton Co., 10 Wall. 676, 19 L. Ed. 1040 (U. S. 1870); Dobbs v. Atlas Elev. Co., 25 S. D. 177, 126 N. W. 250 (1910); TITLE INS. & TRUST CO. v. CAL. DEVEL. CO., 168 Cal. 397, 143 Pac. 723, Powell, Cas. Agency, 159 (1914). Cf. Calhoun v. Millard, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248 (1890).

An exceptional rule prevailed in marine insurance that a person on whose behalf insurance is effected may ratify after knowledge of loss, though he would not then be able to make such a contract. See footnote 37, p. 166, infra. See 25 Harv. Law Rev. 79, on the ability to ratify an unauthorized contract of insurance after loss.

This exception is generally not applied in cases of fire insurance. Kline Bros. & Co. v. Royal Ins. Co., 192 Fed. 378 (C. C. 1911). But the Circuit Court of Appeals, in the case of Marqusee v. Hartford

Thus a corporation may ratify an act within its corporate powers.<sup>43</sup> Even an agent may ratify an unauthorized act done on behalf of his principal by another, if his powers are such that he might have authorized it.<sup>44</sup> Within this principle, an unauthorized act done on behalf of a corporation may be ratified by its proper officers, provided the act be within the scope of the corporate powers.<sup>45</sup> But, since ratification of an act can have no greater effect than previous authority to do the act, a person who is incompetent to authorize cannot ratify.<sup>46</sup> Nor if he was incompetent when the act was done, so that his appointment of an agent would have been void, can he ratify it upon subsequently becoming competent.<sup>47</sup> Thus, in jurisdictions where the appointment of an agent by an infant is void,<sup>48</sup> he cannot ratify upon coming of age,<sup>49</sup> although in juris-

Ins. Co., 198 Fed. 475, 119 C. C. A. 251, 42 L. R. A. (N. S.) 1025 (1912), applied it to fire insurance. See 11 Mich. Law Rev. 163.

<sup>43</sup> Fleckner v. Bank, 8 Wheat. 363, 5 L. Ed. 631 (U. S. 1823); Dispatch Line of Packets v. Manufacturing Co., 12 N. H. 205, 37 Am. Dec. 203 (1841); Kelsey v. Bank, 69 Pa. 426 (1871); Irvine v. Union Bank, L. R. 2 App. Cas. 366 (1877); Morawetz, Corp. § 618. The state may ratify. State v. Buttles' Ex'r, 3 Ohio St. 309 (1854); State v. Shaw, 28 Iowa, 67 (1869); State v. Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395 (1879).

<sup>44</sup> Mound City Mut. Life Ins. Co. v. Huth, 49 Ala. 529 (1873); Whitehead v. Wells, 29 Ark. 99 (1874); Ironwood Store Co. v. Harrison, 75 Mich. 197, 42 N. W. 808 (1889); Horrabin & Co. v. McCalum, 191 Iowa, 441, 182 N. W. 646 (1921).

<sup>45</sup> Fleckner v. Bank, 8 Wheat. 338, 5 L. Ed. 631 (U. S. 1823); Kelsey v. Bank, 69 Pa. 426 (1871); Lyndeborough Glass Co. v. Glass Co., 111 Mass. 315 (1873).

<sup>46</sup> Doe v. Roberts, 16 M. & W. 778, 153 Rep. 1404 (1847); Brady v. Mayor, 16 How. Prac. 432 (N. Y. 1857); Armitage v. Widoe, 36 Mich. 124 (1877); Reid v. Alaska Packing Co., 47 Or. 215, 83 Pac. 139 (1905).

<sup>47</sup> The execution by a husband of a lien on crops belonging to his wife without her joining being void, she cannot ratify on becoming discovert. Rawlings v. Neal, 126 N. C. 271, 35 S. E. 597 (1900).

Cf. case where P. was of unsound mind at time of unauthorized act. Blinn v. Schwartz, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806 (1904).

<sup>48</sup> See section 68, *infra*.

<sup>49</sup> TRUEBLOOD v. TRUEBLOOD, 8 Ind. 195, 65 Am. Dec. 756, Powell, Cas. Agency, 177 (1856).

dictions where the appointment is merely voidable he may ratify.<sup>50</sup> Whether an insane person may ratify an unauthorized act after removal of his disability depends upon whether the appointment of an agent by an insane person is voidable or void.<sup>51</sup>

It is said that the principal may not ratify a contract unless he have present ability to perform it; for example, that a principal may not ratify a contract for the sale of land if he has already conveyed the land to a stranger.<sup>52</sup> Undoubtedly he cannot, by ratifying, defeat the rights of his grantee.<sup>53</sup> But it seems that he may nevertheless, if he sees fit, ratify the contract, thereby making himself liable to the other party for the result of nonperformance, and to the agent, as in other cases of ratification; in other words, that he may ratify, but that the retrospective effect of the ratification will be limited by the rights which have intervened.<sup>54</sup>

<sup>50</sup> *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697 (1897).

<sup>51</sup> See section 69, *infra*.

<sup>52</sup> "If an individual, pretending to be the agent of another, should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract if, between its date and the attempted ratification, he had disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone." *McCracken v. City of San Francisco*, 16 Cal. 591, at page 624, per Field, C. J. (1860).

<sup>53</sup> See section 60, *infra*.

<sup>54</sup> "The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive effect of the ratification is subject to this qualification: The intervening rights of third persons cannot be defeated by the ratification." *Cook v. Tullis*, 18 Wall. 332, at page 338, 21 L. Ed. 933 (U. S. 1873).

**CONDITIONS PRECEDENT TO RATIFICATION—  
KNOWLEDGE OF FACTS**

51. Ratification is not binding upon the person ratifying, unless made with knowledge of all the material facts, or unless made with the intention to ratify whatever the facts may be.

Since ratification rests upon assent, to be binding it must, as a rule, be made with full knowledge of all the facts necessary to an intelligent exercise of the right of election. "No doctrine is better settled on principle or authority than this: That the ratification of the act of an agent previously unauthorized must, in order to bind the principal, be with full knowledge of the material facts. If the material facts are either suppressed or unknown, the ratification is invalid, because founded on mistake or fraud."<sup>55</sup> Hence, if the principal has ratified upon insufficient knowledge, he may, as a rule, after he is informed of the facts, disaffirm. Knowledge of the facts, however, is sufficient; knowledge of their legal effect is not requisite.<sup>56</sup>

Nevertheless it is within the power of the principal, if he sees fit, to ratify without full knowledge. "The intention to adopt the act at all events is the same as adopting

<sup>55</sup> Owings v. Hull, 9 Pet. 607, 9 L. Ed. 246, per Story, J. (U. S. 1835); Lewis v. Read, 13 M. & W. 834, 153 Rep. 350 (1845); COMBS v. SCOTT, 94 Mass. (12 Allen) 493, Powell, Cas. Agency, 139 (1866); Aetna Ins. Co. v. Iron Co., 21 Wis. 458 (1867); Baldwin v. Burrows, 47 N. Y. 199 (1872); Bannon v. Warfields, 42 Md. 22 (1875); Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150 (1878); Bennecke v. Insurance Co., 105 U. S. 355, 26 L. Ed. 990 (1881); Bohart v. Oberne, 36 Kan. 284, 13 Pac. 388 (1887); Holm v. Bennett, 43 Neb. 808, 62 N. W. 194 (1895); Pritchard v. Sigafus, 103 App. Div. 535, 93 N. Y. Supp. 152 (1905); Smith v. Abbott, 221 Mass. 326, 109 N. E. 190 (1915); Forest Hill, etc., Ass'n v. Fisher, 140 Md. 666, 118 Atl. 164 (1922).

<sup>56</sup> Hilbery v. Hatton, 2 H. & C. 822 (1864); Kelley v. Newburyport & A. H. Railroad Co., 141 Mass. 496, 6 N. E. 745 (1886); Hyatt v. Clark, 118 N. Y. 563, 23 N. E. 891 (1890).

with knowledge.”<sup>57</sup> If he deliberately ratifies upon such knowledge as he possesses, without caring for more, intentionally assuming the risk of the facts, he has the right to do so, and a ratification made under such circumstances is binding.<sup>58</sup> But, since the principal is under no obligation to ratify an unauthorized act, it is for the person who relies upon a ratification to show that all material facts were made known to the principal, or else that the circumstances were such as to manifest an intention on his part to ratify at all events.<sup>59</sup> Nor does mere negligence or omission to make inquiries necessarily manifest an intention to ratify, or necessarily preclude the principal from disaffirming upon subsequently learning the facts.<sup>60</sup> Yet, while

<sup>57</sup> Patteson, J., in *Freeman v. Rosher*, 13 Q. B. 780, 116 Rep. 1462 (1849).

<sup>58</sup> *Lewis v. Read*, 13 M. & W. 834, 153 Rep. 350 (1845); *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43 (1871); *Kelley v. Railroad Co.*, 141 Mass. 496, 6 N. E. 745 (1886); *Ehrmanntraut v. Robinson*, 52 Minn. 333, 54 N. W. 188 (1893); *Western Inv. & Land Co. v. First Nat. Bank*, 64 Colo. 37, 172 Pac. 6 (1918); *Hutchinson Co. v. Gould*, 180 Cal. 356, 181 Pac. 651 (1919).

<sup>59</sup> *COMBS v. SCOTT*, 94 Mass. (12 Allen) 493, Powell, Cas. Agency, 139 (1866); *Wheeler v. Sleigh Co.*, 39 Fed. 347 (C. C. 1889); *Moore v. Ensley*, 112 Ala. 228, 20 South. 744 (1895); *C. E. Wise & Bro. v. Texas Co.*, 166 N. C. 610, 82 S. E. 974 (1914); *Pope v. Hoyt*, 200 App. Div. 475, 193 N. Y. Supp. 179 (1922).

<sup>60</sup> *COMBS v. SCOTT*, 94 Mass. (12 Allen) 493, at page 497, Powell, Cas. Agency, 139 (1866), Bigelow, C. J., said: “We do not mean to say that a person can be willfully ignorant, or purposely shut his eyes to means of information within his possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but our opinion is that ratification of an antecedent act of an agent, which was unauthorized, cannot be held valid and binding, where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them.”

See *Murray v. Lumber Co.*, 143 Mass. 250, 9 N. E. 634 (1887); *Brown v. Bamberger*, 110 Ala. 342, 20 South. 114 (1895); *Valley Bank of Phoenix v. Brown*, 9 Ariz. 311, 83 Pac. 362 (1905); *Heinzerling v. Agen*, 46 Wash. 390, 90 Pac. 262 (1907).

failure to make full inquiry does not charge the principal, as matter of law, with knowledge of what an inquiry would have disclosed, it may be strong evidence of an intention to adopt at all events.<sup>61</sup> Thus, where the principal accepts the benefits of an unauthorized contract, without any attempt to ascertain its terms, the inference is strong, and may be conclusive, that he intended to take the risk and adopt the contract upon such knowledge as he had.<sup>62</sup> But if the contract was such as the agent was authorized to make, and the principal had no reason to suppose that the agent had departed from his instructions, the fact that the principal accepted the benefits without inquiry would be no evidence of intention to adopt a contract into which the agent had, without informing his principal, introduced unauthorized terms.<sup>63</sup>

<sup>61</sup> "With respect to those who do not think proper to seek information, the fact that they did not choose to inquire is strong evidence that they were satisfied to adopt the acts of the directors at all events and under whatever circumstances." *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43, at page 58 (1871), per Willes, J. See *Pope v. J. K. Armsby Co.*, 111 Cal. 159, 43 Pac. 589 (1896); *Cranston v. West Coast Life Ins. Co.*, 72 Or. 118, 142 Pac. 762 (1914).

The principal cannot escape liability by purposely closing his eyes. *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634 (1898).

<sup>62</sup> *Meehan v. Forrester*, 52 N. Y. 277 (1873); *Busch v. Wilcox*, 82 Mich. 336, 47 N. W. 328, 21 Am. St. Rep. 563 (1890); *State Bank v. Kelly*, 109 Iowa, 544, 80 N. W. 520 (1899); *The Henrietta*, 91 Fed. 675 (D. C. 1899); *Glor v. Kelly*, 49 App. Div. 617, 63 N. Y. Supp. 339 (1900).

Where a principal, knowing that an unauthorized lease had been made in his behalf, entered into possession and enjoyed the use of the premises without knowing or ascertaining the terms of the lease, he must be held to have intended to ratify the lease, whatever it might be. *Ehrmanntraut v. Robinson*, 52 Minn. 333, 54 N. W. 188 (1893); *Moyers v. Fogarty*, 140 Iowa, 701, 119 N. W. 159 (1909), and criticism thereof in 9 Col. Law Rev. 444; *Amazon Fire Ins. Co. v. Bond*, 65 Okl. 224, 165 Pac. 414 (1917).

<sup>63</sup> *Roberts v. Rumley*, 58 Iowa, 301, 12 N. W. 323 (1882); *John Gund Brewing Co. v. Fourtelotte*, 108 Minn. 71, 121 N. W. 417, 29 L. R. A. (N. S.) 210 (1909); *Shields v. Hitchinan*, 251 Pa. 455, 96 Atl. 1039 (1916).

Where a principal authorized an agent to sell stock, expressly reserving the right to a dividend, and the agent sold, agreeing that

**CONDITIONS PRECEDENT TO RATIFICATION—IS COMMUNICATION NECESSARY?**

- 52.** It is unsettled whether an uncommunicated, but objectively evidenced, intent to adopt the act of another, constitutes ratification.

In most cases P. clearly evidences his intent to adopt the unauthorized act of his servant, agent, or the stranger, and no question is therefore raised on this problem. It is frequently said that if A. purported to act as the representative of P., and P. had the requisite knowledge, then any conduct of P., consistent only with the validity of the contract, amounts to ratification. For practical purposes T. would never be able to prove the ratification, unless P.'s words or conduct had become known either to T. or to some person other than P. who could be produced as a witness, so the question really becomes this: If P. communicates his present intent to adopt the act of A. to some person unconnected with the transaction, has he thereby ratified the act of A.? In the case of *Rutland & Burlington R. R. Co. v. Lincoln's Estate*<sup>64</sup> the court held that such a statement to a disinterested person did not establish as a matter of law a sufficient ratification. It is submitted that this result is sound, but that such evidence did constitute some evidence of ratification sufficient to carry the question to the jury.

the dividend should go with the stock, and the owner received the exact amount for which he had authorized the stock to be sold, without knowledge of the agreement, retaining the proceeds was not a ratification. *Wheeler v. Sleigh Co.*, 39 Fed. 347 (C. C. 1889).

<sup>64</sup> *Rutland & Burlington R. R. Co. v. Lincoln's Estate*, 29 Vt. 206 (1857). See, also, *Wilson v. Atwood*, 122 Atl. 797 (N. H. 1923).

**HOW AN ACT MAY BE RATIFIED—GENERAL**

53. Generally an act may be ratified by any words or conduct showing an intention upon the part of the person ratifying to adopt the act in whole or in part as his own.

Ratification is, as we have seen,<sup>65</sup> the exercise of a right of election on the part of the quasi principal to adopt as his own an act done on his behalf. No new consideration is needed.<sup>66</sup> It is therefore an assent to accept the benefits and burdens of the act. It follows that the ratification must be of the act as a whole, or in toto, with all its burdens, or not at all.<sup>67</sup> This principle is illustrated by the rule that any conduct of the principal, with knowledge of the facts, in recognition of the transaction, is a ratification.<sup>68</sup> Since ratification rests upon assent,<sup>69</sup> it is ordinarily necessary, as we have seen, that the person ratifying have knowledge of the facts, for otherwise the assent is only apparent, and not real, and the ratification will not be binding upon him, unless he intended to ratify what-

<sup>65</sup> See section 51, supra.

<sup>66</sup> Drakeley v. Gregg, 75 U. S. (8 Wall.) 242, at page 267, 19 L. Ed. 409 (1868); Grant v. Beard, 50 N. H. 129 (1870); Lynch v. Smyth, 25 Colo. 103, 54 Pac. 634 (1898); BLACKWELL v. KERCHEVAL, 27 Idaho, 537, 149 Pac. 1060, Powell, Cas. Agency, 161 (1915).

<sup>67</sup> Southern Exp. Co. v. Palmer, 48 Ga. 85 (1873); Eberts v. Selover, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278 (1880); Gaines v. Miller, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466 (1884); Billings v. Mason, 80 Me. 496, 15 Atl. 59 (1888); Shoninger v. Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88 (1889); Teague v. Maddox, 150 U. S. 128, 14 Sup. Ct. 46, 37 L. Ed. 1025 (1893); Key v. Insurance Co., 107 Iowa, 446, 78 N. W. 68 (1899); S. W. Nat. Bank v. Justice, 157 N. C. 373, 72 S. E. 1016 (1911); Hartsell v. Roberts, 185 Ala. 201, 64 South. 90 (1913); BLACKWELL v. KERCHEVAL, 27 Idaho, 537, 149 Pac. 1060, Powell, Cas. Agency, 161 (1915); Nat. Bank of Wray v. Wildman, 71 Colo. 247, 205 Pac. 947 (1922).

<sup>68</sup> See cases in footnote 75, p. 148, infra.

<sup>69</sup> See cases in footnote 74, p. 147, infra.

ever the facts might turn out to be. The assent of the principal may be shown by words or by conduct, or, in other words, it may be express or implied. No formalities are requisite. The only exception to this rule is that, where an act is one which could have been authorized only by observance of a particular form, generally, that form must be observed to effect a ratification.<sup>70</sup>

Although a ratification once made is irrevocable,<sup>71</sup> the mere fact that the principal at first refuses to recognize an unauthorized act does not prevent him from afterwards ratifying,<sup>72</sup> provided the other party has not acted upon the refusal.<sup>73</sup>

Any form of words which expresses the assent of the principal to adopt an act done in his behalf is sufficient evidence of ratification.<sup>74</sup> Except in the cases mentioned in the paragraphs 54 and 55 below, it is immaterial whether the words are spoken or written, or whether they are under seal.

<sup>70</sup> See sections 54 and 55, *infra*.

Where notes of a town could not be issued by its treasurer, unless authorized by a town meeting held pursuant to notice, specifying its object, their unauthorized issue by him could not be ratified, except by vote of a town meeting held pursuant to such notice. *Town of Bloomfield v. Bank*, 121 U. S. 135, 7 Sup. Ct. 865, 30 L. Ed. 923 (1887).

<sup>71</sup> See section 59, *infra*.

<sup>72</sup> *Woodward v. Harlow*, 28 Vt. 338 (1856).

<sup>73</sup> *Wilkinson v. Harwell*, 13 Ala. 660 (1848); *Fiske v. Holmes*, 41 Me. 441 (1856).

<sup>74</sup> Where an agent entered into an unauthorized agreement, and the principal wrote that he did not know what the agent had agreed to, but that, of course, he must support him in all that he had done, the evidence of ratification was sufficient. *Fitzmaurice v. Bayley*, 6 El. & B. 868, 119 Rep. 1087 (1856). See, also, *Haseler v. Lemoyne*, 5 C. B. (N. S.) 530, 141 Rep. 214 (1858); *Merrill v. Parker*, 112 Mass. 250 (1873); *Chauche v. Pare*, 75 Fed. 283, 21 C. C. A. 329 (1896); *Fenn v. Dickey*, 178 Pa. 258, 35 Atl. 1108 (1896); *Blakley v. Cochran*, 117 Mich. 394, 75 N. W. 940 (1898).

Giving as a reason for repudiating a contract, unauthorized in several particulars, that it is unauthorized in a particular in which it is authorized, is not a ratification. *Brown v. Henry*, 172 Mass. 559, 52 N. E. 1073 (1899).

Since intention may be manifested by conduct as well as by words, ratification will be implied from any conduct showing an intention to adopt the act. Any act done in recognition of the transaction, in whole or in part, if done with knowledge of all the material facts, is evidence, and is ordinarily conclusive evidence, of ratification.<sup>75</sup> If an act be done in recognition without full knowledge, its weight, as showing a ratification, will depend upon whether, in view of all the circumstances, it may reasonably be inferred that the principal intended to adopt the act at all events, but the burden is upon the person seeking to establish ratification under such circumstances.<sup>76</sup> The acts from which a ratification may be implied are as various as the subject-matters of agency.<sup>77</sup>

#### HOW AN ACT MAY BE RATIFIED—DEED

##### 54. Generally an instrument under seal can be ratified only by an instrument of like character.

As we have seen, at common law an agent can be appointed to execute an instrument under seal only by instrument of like character.<sup>78</sup> Ratification cannot stand upon a higher ground than original authority, and if the act must be under seal the ratification also must be under seal.<sup>79</sup> Such a ratification may be effected by an instrument in terms ratifying the deed, or by a power of attorney.

<sup>75</sup> Watt v. M. K. & T. R. R. Co., 82 Kan. 458, 108 Pac. 811 (1910); Cranston v. West Coast Life Ins. Co., 72 Or. 116, 142 Pac. 762 (1914); Shimonek v. Neb. Bldg. & Inv. Co., 191 N. W. 668 (Neb. 1922).

Cf. Flowe v. Hartwick, 167 N. C. 48, 83 S. E. 841 (1914), and comment thereon in 13 Mich. Law Rev. 523.

<sup>76</sup> See section 51, *supra*.

<sup>77</sup> Sanders v. Peck, 87 Fed. 61, 30 C. C. A. 530 (1898), and cases in footnotes in sections 56, 57, and 58, pp. 151-157, *infra*.

<sup>78</sup> See section 8, *supra*.

<sup>79</sup> Blood v. Goodrich, 12 Wend. 525, 27 Am. Dec. 152 (N. Y. 1834); Dispatch Line of Packets v. Manufacturing Co., 12 N. H. 205, 37 Am. Dec. 203 (1841); Spofford v. Hobbs, 29 Me. 148, 48 Am. Dec. 521 (1848); Grove v. Hodges, 55 Pa. 504 (1867); Zimpelman v. Keating,

ney, prospective in terms, authorizing the deed, but dated back to a period anterior to the execution of the deed it is intended to ratify.<sup>80</sup> As in the case of appointment,<sup>81</sup> if it was not essential that the instrument ratified should be under seal, the seal, though attached, being superfluous, may be disregarded, and a parol ratification is sufficient.<sup>82</sup> An exception to the rule is generally recognized in cases of partnership, where it is held that one partner may ratify by parol a deed executed by another in the name of the firm.<sup>83</sup> In Massachusetts the court has extended the doctrine of parol ratification to all classes of cases.<sup>84</sup>

72 Tex. 318, 12 S. W. 177 (1888); Oxford v. Crow, 3 Ch. 535 (1893); Neely & Co. v. Stevens, 138 Ga. 305, 75 S. E. 159 (1912).

The significance of this rule has been greatly lessened by statutes abolishing the necessity of a seal. State ex rel. v. Parke-Davis & Co., 191 Mo. App. 219, 177 S. W. 1070 (1915).

Where a wife executed a deed in blank as to the name of the grantee, the date, and the consideration, and delivered it to her husband, who filled the blanks and delivered it to defendant as grantee, and she knowingly used the consideration, she thereby ratified the conveyance. Reed v. Morton, 24 Neb. 760, 40 N. W. 282, 1 L. R. A. 736, 8 Am. St. Rep. 247 (1888). As to authority to fill blanks, see section 8, *supra*.

<sup>80</sup> Milliken v. Coombs, 1 Greenl. 343, 10 Am. Dec. 70 (Me. 1821); Riggan v. Crain, 86 Ky. 249, 5 S. W. 561 (1887). See, also, Rice v. McLarren, 42 Me. 157 (1856).

Otherwise, if the power of attorney is prospective in terms and is not dated back to a period anterior to the execution of the deed. War Fork Land Co. v. Marcum, 180 Ky. 352, 202 S. W. 668 (1918).

<sup>81</sup> See section 8, *supra*.

<sup>82</sup> Worrall v. Munn, 5 N. Y. 229, 238, 55 Am. Dec. 330 (1851); Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490 (1870); Adams v. Power, 52 Miss. 828 (1876); State v. Railroad Co., 8 S. C. 129 (1875); Lynch v. Smyth, 25 Colo. 103, 54 Pac. 634 (1898); Donason v. Barbero, 230 Ill. 138, 82 N. E. 620 (1907); Goldring v. Reid, 61 Fla. 250, 54 South. 718 (1911); State ex rel. v. Parke-Davis & Co., 191 Mo. App. 219, 177 S. W. 1070 (1915); McLEOD v. MORRISON, 66 Wash. 683, 120 Pac. 528, 38 L. R. A. (N. S.) 783, Powell, Cas. Agency, 145 (1912). Contra: Pollard v. Gibbs, 55 Ga. 45 (1875).

<sup>83</sup> Skinner v. Dayton, 19 Johns. 513, 10 Am. Dec. 286 (N. Y. 1822);

<sup>84</sup> McIntyre v. Park, 77 Mass. (11 Gray) 102, 71 Am. Dec. 690 (1858); Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146 (1874); Gross v. Cohen, 236 Mass. 468, 128 N. E. 714 (1920).

## HOW AN ACT MAY BE RATIFIED—WRITING NOT UNDER SEAL

55. The ratification of a contract in writing, but not under seal, may be by parol, except where some statute enacts that authority to do the given act must be in writing, in which case the ratification must be in writing.

At common law all contracts which are not specialties may be ratified, as they may be authorized, by parol.<sup>85</sup> Unless the authority of an agent to execute a simple contract is required by statute to be in writing, ratification may be by any form of parol. Even under the statute of frauds, as has been pointed out,<sup>86</sup> the requirement that the agreement or note or memorandum, if signed by some person other than the party to be charged, must be signed by some person "thereunto by him lawfully authorized," is satisfied by any form of appointment or ratification sufficient by the rules of the common law.<sup>87</sup> But, where a statute enacts that the authority must be in writing, the ratification must be in like form.<sup>88</sup>

Cady v. Shepherd, 28 Mass. (11 Pick.) 400, 22 Am. Dec. 379 (1831); Peine v. Weber, 47 Ill. 41 (1868).

See same holding as to bond given by agent of partners in 3 Harv. Law Rev. 334.

<sup>85</sup> See section 7, supra.

<sup>86</sup> See section 7, supra.

<sup>87</sup> MacLean v. Dunn, 4 Bing. 722, 130 Rep. 947 (1828); Ehrmann-traut v. Robinson, 52 Minn. 333, 54 N. W. 188 (1893); KEIM v. O'REILLY, 54 N. J. Eq. 418, 34 Atl. 1073; Powell, Cas. Agency, 3 (1896); Beard v. Herndon, 84 Okl. 142, 203 Pac. 226 (1921).

<sup>88</sup> McDowell v. Simpson, 3 Watts, 129, 27 Am. Dec. 338 (Pa. 1834); Hawkins v. McGroarty, 110 Mo. 546, 19 S. W. 830 (1892); KOZEL v. DEARLOVE, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416; Powell, Cas. Agency, 149 (1892); Long v. Poth, 16 Misc. Rep. 85, 37 N. Y. Supp. 670 (1896); Lithograph Bldg. Co. v. Watt, 96 Ohio St. 74, 117 N. E. 25 (1917). Contra: Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490 (1870).

## HOW AN ACT MAY BE RATIFIED—ACCEPTING BENEFITS

**56.** Conduct consisting of the accepting of the benefits of unauthorized action amounts to ratification, provided all other conditions precedent are satisfied.

A principal who, with knowledge, accepts the benefit of a transaction, is deemed to have ratified it.<sup>89</sup> Thus, where the agent without authority makes a sale or a purchase, the principal, by accepting the proceeds of the sale,<sup>90</sup> or by accepting the property,<sup>91</sup> is held to ratify the sale or the purchase. Thus ratification is established where the prin-

<sup>89</sup> *Codwise v. Hacker*, 1 Caines, 526 (N. Y. 1804); *Reid v. Hibbard*, 6 Wis. 175 (1857); *Low v. Railroad Co.*, 46 N. H. 284 (1865); *Dunn v. Railroad Co.*, 43 Conn. 434 (1876); *Rich v. Bank*, 7 Neb. 201, 29 Am. Rep. 382 (1878); *Waterson v. Rogers*, 21 Kan. 529 (1879); *Hausser v. Niblack*, 80 Ind. 407 (1881); *Bacon v. Johnson*, 56 Mich. 182, 22 N. W. 276 (1885); *Wheeler & Wilson Mfg. Co. v. Aughey*, 144 Pa. 398, 22 Atl. 667, 27 Am. St. Rep. 638 (1891); *Alton Mfg. Co. v. Garrett Biblical Inst.*, 243 Ill. 298, 90 N. E. 704 (1910); *Bodine v. Berg*, 82 N. J. Law, 662, 82 Atl. 901, 40 L. R. A. (N. S.) 65, Ann. Cas. 1913D, 721 (1912); *Lemcke v. A. L. Funk & Co.*, 78 Wash. 460, 139 Pac. 234, Ann. Cas. 1915D, 23 (1914) text approved; *Montwil v. American Locomotive Co.*, 173 App. Div. 387, 159 N. Y. Supp. 21 (1916); *Springsteen v. Lewis*, 259 Fed. 518, 171 C. C. A. 14 (1919); *Francois Coal Co. v. Troll Coal Co.*, 116 S. E. 151 (W. Va. 1923).

<sup>90</sup> *Hunter v. Parker*, 7 M. & W. 322, 151 Rep. 789 (1840); *Lindroth v. Litchfield*, 27 Fed. 894 (C. C. 1886); *Tilleny v. Wolverton*, 54 Minn. 75, 55 N. W. 822 (1893); *Town of Ansonia v. Cooper*, 64 Conn. 536, 30 Atl. 760 (1894); *Smith v. Barnard*, 148 N. Y. 420, 42 N. E. 1054 (1896); *Warner v. Hill*, 153 Ga. 510, 112 S. E. 478 (1922).

<sup>91</sup> *Waithman v. Wakefield*, 1 Camp. 120 (1807); *Hastings v. Bangor House*, 18 Me. 436 (1841); *Moss v. Mining Co.*, 5 Hill. 137 (N. Y. 1843); *Ketchum v. Verdell*, 42 Ga. 534 (1871); *Jones v. Atkinson*, 68 Ala. 167 (1880); *Hall v. White*, 123 Pa. 95, 16 Atl. 521 (1889), taking possession of land under unauthorized contract for purchase; *Chambers v. Haney*, 45 La. Ann. 447, 12 South. 621 (1893), selling land received under unauthorized exchange; *Ehrmantraut v. Robinson*, 52 Minn. 333, 54 N. W. 188 (1893), entry and use of land under an unauthorized lease; *McKinstry v. Bank*, 57 Kan. 279, 46 Pac. 302 (1896); *Wright v. Vinyard Church*, 72 Minn. 78, 74 N. W. 1015 (1898), retaining and using after notice of repudiation.

cipal knowingly accepts rent under an unauthorized lease,<sup>92</sup> or the proceeds of an unauthorized loan,<sup>93</sup> or of a compromise,<sup>94</sup> or effects a settlement with an agent for embezzlement of the proceeds of an unauthorized sale.<sup>95</sup> The act must, however, be inconsistent with the existence of an intention not to adopt, and hence conduct which would have been within the principal's right in case he repudiated the transaction will not amount to ratification.<sup>96</sup> And if the principal is ignorant of material facts, as where he accepts moneys from an agent without knowledge that they are the proceeds of an unauthorized sale, intention to ratify cannot be implied,<sup>97</sup> nor will such intention be inferred

<sup>92</sup> Reynolds v. Davison, 34 Md. 662 (1871); Burkhard v. Mitchell, 16 Colo. 376, 26 Pac. 657 (1891); Meyers v. Knights of Pythias, 194 App. Div. 405, 185 N. Y. Supp. 436 (1920); Payne Realty Co. v. Lindsey, 91 W. Va. 127, 112 S. E. 306 (1922).

<sup>93</sup> Perkins v. Boothby, 71 Me. 91 (1880); Taylor v. Ass'n, 68 Ala. 229 (1880); Willis v. Sanitation Co., 53 Minn. 370, 55 N. W. 550 (1893).

<sup>94</sup> Strasser v. Conklin, 54 Wis. 102, 11 N. W. 254 (1882); National Imp. & Const. Co. v. Maiken, 103 Iowa, 118, 72 N. W. 431 (1897).

<sup>95</sup> Ogden v. Marchand, 29 La. Ann. 61 (1877).

<sup>96</sup> White v. Sanders, 32 Me. 188 (1850); Deacon v. Greenfield, 141 Pa. 467, 21 Atl. 650 (1891).

The owner of a building did not become liable for improvements made under an unauthorized contract with his agent, because he afterwards used them, where they were of such a character that they could not be removed. Mills v. Berla, 23 S. W. 910 (Tex. Civ. App. 1893).

Where defendant's superintendent, contrary to orders, bought goods, and, colluding with the seller, caused them to be intermingled with other goods from the same seller, some of which had been paid for, and it could not be ascertained whether the goods in question had been paid for, retaining and selling them was not a ratification. Schutz v. Jordan, 32 Fed. 55 (C. C. 1887).

A mere effort on the part of the principal, after knowledge of the unauthorized act, to avoid loss thereby, will not amount to ratification, so as to relieve the agent from liability. Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113 (1891).

<sup>97</sup> Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480 (1873). See, also, McGlassen v. Tyrrell, 5 Ariz. 51, 44 Pac. 1088 (1896); Chicago, Edison Co. v. Fay, 164 Ill. 323, 45 N. E. 534 (1896); Martin v. Hickman, 64 Ark. 217, 41 S. W. 852 (1897).

After commencement of an action of replevin for cattle claimed

from failure to return the benefits, if on such return the principal cannot be restored to his original position.<sup>98</sup>

### HOW AN ACT MAY BE RATIFIED—BRINGING SUIT

#### 57. Bringing suit predicated upon the validity of the unauthorized transaction amounts to ratification.

Bringing an action, based upon the unauthorized transaction, whether against the person with whom the agent dealt, or the agent himself, is ordinarily conclusive evidence of ratification.<sup>99</sup> Thus, where the principal sues the other party to a contract made in his behalf,<sup>1</sup> or brings an ac-

by defendants under a sale by plaintiff's agent, which plaintiff claimed was unauthorized, but before trial, plaintiff learned that it had received the benefit of a portion of the proceeds of sale. Held, that its failure then to return or tender such portion was a ratification which defeated recovery. *Johnston v. Investment Co.*, 49 Neb. 68, 68 N. W. 383 (1896); *John Gund Brewing Co. v. Tourtelotte*, 108 Minn. 71, 121 N. W. 417, 29 L. R. A. (N. S.) 210 (1909).

<sup>98</sup> *German American Bank v. Mutual Ben., etc., Ass'n*, 107 Neb. 124, 185 N. W. 313 (1921).

<sup>99</sup> *Smith v. Morse*, 9 Wall. 82, 19 L. Ed. 597 (U. S. 1869); *Connell v. City of Chicago*, 114 Ill. 233, 29 N. E. 280 (1885); *Merrill v. Wilson*, 66 Mich. 232, 33 N. W. 716 (1887); *Tingley v. Boom Co.*, 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055 (1893), pleading an unauthorized contract as a defense held a ratification; *Philips Butterff Mfg. Co. v. Wild Bros.*, 144 Ala. 545, 39 South. 359 (1905); *Arzuaga v. Gonzalez*, 239 Fed. 60, 152 C. C. A. 110, L. R. A. 1917D, 697 (1917); *Bourland v. Huffhines*, 244 S. W. 847 (Tex. Civ. App. 1923).

In an action for conversion of notes collusively transferred to defendant by plaintiff's agent, it appeared that under the contract of agency all notes were to be taken in plaintiff's name, but that the agent had taken them in his own. Held, that by bringing the suit plaintiff ratified the agent's act, and might recover for the conversion. *Warder, Bushnell & Glessner Co. v. Cuthbert*, 99 Iowa, 681, 68 N. W. 917 (1896).

<sup>1</sup> "When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant, they had an election to repudiate the arrangement. \* \* \* But, knowing the terms of sale, they elected to sue in assumpsit on the contract for the agreed price, and thereby they affirmed the contract, and ratified the act of the agent, precisely as if it had been expressly

tion to enforce security taken in his name,<sup>2</sup> or sues the agent for an accounting of the proceeds of an unauthorized transaction,<sup>3</sup> he thereby elects to take the benefit of the transaction, and adopts it in toto.

### HOW AN ACT MAY BE RATIFIED—ACQUIESCENCE OR SILENCE

58. The significance of acquiescence or silence varies according to length of its continuance, the closeness of relation between the alleged ratifier and the doer of the act, and the extent of the duty to speak imposed by the circumstances.

While an unauthorized act cannot take effect as the act of the principal unless it be ratified, and hence need not be rescinded, it is evident that his failure to express dissent upon being informed of a transaction may reasonably give ground for inferring assent. If, for example, an agent should make an unauthorized sale of his principal's property, and the principal, after being informed, should remain silent, knowing that the purchaser was dealing with the property as his own, the principal's silence would speak his assent as clearly as words.<sup>4</sup> And, notwithstanding that

approved upon being reported to them by the agent or the defendant." *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88, per Loomis, J. (1889). See, also, *Benson v. Liggett*, 78 Ind. 452 (1881); *Curnane v. Scheidel*, 70 Conn. 13, 38 Atl. 875 (1897); *Edgar v. Joseph Breck & Sons Corp.*, 172 Mass. 581, 52 N. E. 1083 (1899).

<sup>2</sup> *Partridge v. White*, 59 Me. 564 (1871).

<sup>3</sup> *Frank v. Jenkins*, 22 Ohio St. 597 (1872); *Lyell v. Kennedy*, L.R. 14 App. Cas. 437 (1889); *Blinn v. Schwartz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806 (1904).

See where P. attempted to persuade A. to pay over money collected without authority. *Goldstein v. Tank*, 149 App. Div. 341, 134 N. Y. Supp. 262 (1912); *Senger v. Malloy*, 153 Wis. 245, 141 N. W. 6 (1913).

<sup>4</sup> *Hall v. Harper*, 17 Ill. 82 (1855); *Alexander v. Jones*, 64 Iowa, 207, 19 N. W. 913 (1884); *Lunn v. Guthrie*, 115 Iowa, 501, 88 N. W. 1060 (1902); *Elk Val. Coal Co. v. Thompson*, 150 Ky. 614, 150 S. W. 817 (1912).

the principal may not have knowledge that third persons are acting upon the assumption that the agent's act was authorized, it is evident that he will under most circumstances, as a reasonable man, upon being informed of an assumption of authority, express his dissent if he does not intend to adopt the transaction, and that his mere silence is evidence of ratification. Such evidence is, of course, not so strong in the case of an act done by a mere stranger who has volunteered to act in another's behalf as in the case of an agent who has exceeded his authority.<sup>5</sup> Where, however, the relation of principal and agent already exists, the rule is established that failure to repudiate within a reasonable time after being informed of an act done in excess of authority is conclusive evidence of ratification.<sup>6</sup> What time is reasonable must depend upon the facts of each case, and the particular circumstances tending to excuse or explain the principal's silence or to impose the duty of prompt disavowal, but the circumstances may be such as to require immediate repudiation.<sup>7</sup> The rule is sometimes placed upon the ground of equitable estoppel,<sup>8</sup> and

<sup>5</sup> See footnotes 10 and 11, pp. 156, 157, infra.

<sup>6</sup> Johnson v. Wingate, 29 Me. 404 (1849); Brigham v. Peters, 67 Mass. (1 Gray) 139 (1854); Law v. Cross, 1 Black, 533, 17 L. Ed. 185 (U. S. 1861); Saveland v. Green, 40 Wis. 431 (1876); Curry v. Hale, 15 W. Va. 875 (1879); Booth v. Wiley, 102 Ill. 84 (1881); Minnesota Linseed Oil Co. v. Montague, 65 Iowa, 67, 21 N. W. 184 (1884); Cooper v. Mulder, 74 Mich. 374, 41 N. W. 1084 (1889); Hartlove v. William Fait Co., 89 Md. 254, 43 Atl. 62 (1890); Reid v. Alaska Packing Co., 47 Or. 215, 83 Pac. 139 (1905); Russell v. Threshing Machine Co., 17 N. D. 248, 116 N. W. 611 (1908); Minneapolis Threshing Mach. Co. v. Humphrey, 27 Okl. 694, 117 Pac. 203 (1911).

<sup>7</sup> Law v. Cross, 1 Black, 533, 17 L. Ed. 185 (U. S. 1861); Foster v. Rockwell, 104 Mass. 167 (1870); Kelsey v. Bank, 69 Pa. 426 (1871); J. B. OWENS POTTERY CO. v. TURNBULL CO., 75 Conn. 628, 54 Atl. 1122, Powell, Cas. Agency, 151 (1903); Ilgenfritz v. Mo. Pac. Ry. Co., 169 Mo. App. 652, 155 S. W. 854 (1913).

<sup>8</sup> See Kent v. Mining Co., 78 N. Y. 159 (1879); Smith v. Fletcher, 75 Minn. 189, 77 N. W. 800 (1899); Depot Realty Synd. v. Enterprise Brew. Co., 87 Or. 560, 170 Pac. 294, 171 Pac. 223, L. R. A. 1918C, 1001 (1918).

clearly the principle of estoppel is applicable where third persons have acted to their prejudice in reliance upon the apparent assent; but the rule is broader than that of equitable estoppel, and rests upon the presumed intention of the principal, irrespective of whether or not the other party has actually been prejudiced or misled by the delay.<sup>9</sup>

When the unauthorized act is not the act of an agent in excess of his authority, but is the act of a stranger, silence on the part of the quasi principal is logically entitled to less weight. "Where an agency actually exists," says Story, "the mere acquiescence of the principal may give rise to the presumption of an intentional ratification of the act. The presumption is far less strong, and the mere fact of acquiescence may be deemed far less cogent, where no relation of agency exists at the time between the parties. However, if there are peculiar relations of a different sort between the parties, such as that of father and son, the presumption of a ratification will become more vehement, and the duty of disavowal on the part of the principal more urgent, when the facts are brought to his knowledge."<sup>10</sup> Some courts have, indeed, declared that where no agency exists the quasi principal is under no duty to repudiate, and no inference of ratification is to be drawn from his si-

<sup>9</sup> See cases in footnotes 4, 6, pp. 154, 155, supra.

In *Bigg v. Strong*, 3 Sm. & Giff. 592, 65 Rep. 793 (1857), where a son, who usually acted as agent for his father, without authority sold his interest in land, the court said: "It is clearly established that the father had full notice of the agreement, if not immediately or on the same day, yet certainly within five days after the agreement was signed. It cannot be considered that any express act on his part, such as signature of the agreement by himself, or any other solemnity by him after he became privy to the act done by his son on his behalf, was essentially necessary. Subject to his right to a reasonable opportunity to express his dissent, every additional day and hour of silence after he became privy to the contract operates as a tacit acquiescence, and raises the presumption of assent." *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128 (1857); *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634 (1898). Cf. *Mobile, etc., Ry. Co. v. Jay*, 65 Ala. 113 (1880).

<sup>10</sup> Story, Ag. § 256.

lence.<sup>11</sup> This objection, however, should go only to the weight and not to the competency of the evidence, and in such cases, as well as in those where a prior relation has existed, the question is whether, under all the circumstances, the inference of ratification may reasonably be drawn from the principal's silence.<sup>12</sup> "If those circumstances are such that the inaction or silence of the party sought to be charged as principal would be likely to cause injury to the person giving credit to, and relying upon, such assumed agency, or to induce him to believe such agency did in fact exist, and to act upon such belief to his detriment, then such silence or inaction may be considered as a ratification of the agency."<sup>13</sup>

<sup>11</sup> *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385 (1861), semble.

"Should a stranger, without authority, assume to act as the agent of another, it would be intolerable if such other would be bound to compensate the interloper for his services unless he gave the latter 'notice of his dissent within a reasonable time thereafter.' The law imposes no such obligation upon business men in respect to those who, without authority, interfere in their affairs." *Kelly v. Phelps*, 57 Wis. 425, 15 N. W. 385, per Lyon, J. (1883); *Merritt v. Bissell*, 155 N. Y. 396, 50 N. E. 280 (1898).

<sup>12</sup> *Ladd v. Hildebrant*, 27 Wis. 135, 9 Am. Rep. 445 (1870); *Saveland v. Green*, 40 Wis. 431 (1876); *Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861 (1886); *Dugan v. Lyman*, 23 Atl. 657 (N. J. Ch. 1892); *Dierks v. Coffman Bros.*, 96 Ark. 505, 132 S. W. 654 (1910).

"A man who sees what has been done in his name and for his benefit, even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar contract for himself; and, if the power to ratify be conceded to him, the fact of ratification must be provable by the ordinary means. \* \* \* The prior relations of the parties lend great importance to the fact of silence, but it is a mistake to make the competency of the fact dependent on those relations. \* \* \* It is one thing to say that the law will not imply a ratification from silence, and a very different thing to say that silence is a circumstance from which, with others, a jury may not imply it." *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. 329, at page 337, 70 Am. Dec. 128 (1857), per Woodward, J.

<sup>13</sup> *Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861, per Champlin, J. (1886).

**EFFECTS OF RATIFICATION—GENERAL**

59. Ratification, once made, is irrevocable, and generally gives the same legal consequences as prior authority.

Assuming that the act complies with all the requirements hereinbefore set forth, and that the ratifier has conducted himself in some one of the manners hereinbefore set forth as sufficient to constitute ratification, we must then determine what the legal consequences of the ratification are; in other words, we must ascertain to what extent ratification is equivalent or comparable to prior authority.

An election to ratify, once made, is irrevocable.<sup>14</sup> If the principal adopts the act for a moment he is bound.<sup>15</sup>

By the doctrine of relation, the principal, the agent, and the person with whom the agent dealt are, upon ratification, as a rule, invested with the same rights and duties as if the act ratified had been authorized. Yet, while it is the rule that ratification relates back and is equivalent to previous authority, there are many cases in which ratification is in fact far from being equivalent to previous authority, and in which a strict application of the doctrine of relation would lead to absurd and unjust results. To apply the doctrine in such cases would be to adhere to a legal fiction at the expense of facts and plain justice, and the law accordingly recognizes many exceptions to the rule.<sup>16</sup> These exceptions may properly be dealt with in treating of the effect of ratification, for the question is, not what acts are capable of ratification, but rather what are the limitations upon the doctrine of relation in its effect upon the rights

<sup>14</sup> Smith v. Cologan, 2 Term. R. 188, note, 100 Rep. 102n (1788); Jones v. Atkinson, 68 Ala. 167 (1880); Sanders v. Peck, 87 Fed. 61, 30 C. C. A. 530 (1898); Plummer v. Knight, 156 Mo. App. 321, 137 S. W. 1019 (1911); Haines v. Rumph, 147 Ark. 425, 228 S. W. 46 (1921). As to ratification after disapproval; see section 53, supra.

<sup>15</sup> Smith v. Cologan, 2 Term. R. 188, note, 100 Rep. 102n (1788).

<sup>16</sup> Wambaugh, 9 Harv. Law Rev. 60; 5 Harv. Law Rev. 19.

and duties of the different persons concerned, when ratification actually takes place.

The transaction ratified may be a mere act or it may be a contract. In both cases the doctrine of relation applies without exception, so far as concerns the binding force of the ratification upon the principal. In its effect upon the obligations of the other party, however, the doctrine of relation is not universally applicable.<sup>17</sup>

### EFFECTS OF RATIFICATION—INTERVENING RIGHTS OF THIRD PERSONS

60. Ratification does not cut off rights of third persons which have accrued between the doing of the act and the time of ratification.

An obvious limitation upon the doctrine of relation is that it cannot be allowed to defeat rights of strangers which have accrued between the act and the ratification.<sup>18</sup> Thus the principal cannot, by ratifying an unauthorized contract of sale, defeat an intermediate sale of the property made by himself,<sup>19</sup> or defeat intervening liens acquired by attachment or judgment upon the property.<sup>20</sup> So, where an un-

<sup>17</sup> Story, Ag. § 245.

<sup>18</sup> Lord Audley v. Pollard, Cro. Eliz. 561 (1597); Donelly v. Popham, 1 Taunt. 1 (1807); Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612 (1845); Bird v. Brown, 4 Ex. 786, 154 Rep. 1433 (1850); Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933 (U. S. 1874); POLLOCK v. COHEN, 32 Ohio St. 514, at page 525, Powell, Cas. Agency, 154 (1877), very good attachment case; Clendenning v. Hawk, 10 N. D. 90, 86 N. W. 114 (1901); Graham v. Williams, 114 Ga. 716, 40 S. E. 790 (1901); PEOPLE ex rel. GOLDSCHMIDT v. BOARD OF EDUCATION, 217 N. Y. 470, 112 N. E. 167, Powell, Cas. Agency, 157 (1916).

See to same effect Cal. Civ. Code, § 2313.

<sup>19</sup> Parmelee v. Simpson, 5 Wall. 81, 18 L. Ed. 542 (U. S. 1866); McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421 (1898).

Cf. Texas M. Plow Co. v. Klapproth, 164 S. W. 399 (Tex. Civ. App 1914).

<sup>20</sup> Wood v. McCain, 7 Ala. 806, 42 Am. Dec. 612 (1845); Taylor v. Robinson, 14 Cal. 396 (1859); POLLOCK v. COHEN, 32 Ohio St.

authorized notice of stoppage in transitu was given, and afterwards the transitus was terminated by demand for the goods made by the assignees in bankruptcy of the consignee upon, and refusal of, the carrier to deliver the goods, which the carrier delivered to the consignor's assumed agents, it was held that the consignor's subsequent ratification of what had been done on his behalf was inoperative to defeat the right of property in the goods, which upon termination of the transitus had become vested in the assignees in bankruptcy. "In some cases," said Rolfe, B., "where an act which, if authorized, would amount to a trespass, has been done in the name and on behalf of another, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and treat it as having been done by his direction. But this doctrine must be taken with the qualification that the act of ratification must take place at a time, and under circumstances, when the ratifying party might have lawfully done the act which he ratifies. \* \* \* The stoppage could only be made during the transitus. During that period the defendants, without authority from Illins (the consignor), made the stoppage. After the transitus was ended, but not before, Illins ratified what the defendants had done. From that time the stoppage was the act of Illins, but it was then too late for him to stop. The goods had already become the property of the plaintiffs, free from all right of stoppage."<sup>21</sup>

It does not follow, however, that the ratification, although its effect is thus partially defeated by the intervention of superior rights, is totally inoperative. Thus, in

514, Powell, Cas. Agency, 154 (1877); Norton v. Bank, 102 Ala. 420, 14 South. 872 (1893).

Where an agent to collect an account takes a deed of land therefor without authority, and after recording, but before ratification, the land is attached by another creditor, his rights are not defeated by the ratification. Kempner v. Rosenthal, 81 Tex. 12, 16 S. W. 639 (1891).

<sup>21</sup> Bird v. Brown, 4 Ex. 786, at page 799, 154 Rep. 1433 (1850).

the last case, the stoppage by ratification became the act of the consignor, and he might consequently have been held liable for the conversion. Nor upon principle is there any reason why one who sees fit to ratify an unauthorized contract of sale, although he has in the meantime conveyed the property to a stranger, cannot be held to respond in damages to the other party to the contract, or can avoid the obligation to indemnify and compensate the agent.<sup>22</sup>

#### EFFECTS OF RATIFICATION—WHEN THE UNAUTHORIZED ACT, IF AUTHORIZED, WOULD HAVE REQUIRED ACTION THEREON BY T.

61. When the unauthorized act, if authorized, would have required action thereon by T., ratification has no effect.

Where an unauthorized act is of such a nature that it would, if authorized, create a right in favor of the principal to have some act performed by a third person, the performance of which, in the absence of authority on the part of the assumed agent, would be unnecessary, it is manifestly unjust to give to ratification the effect of previous authority, so as to subject the third person, if he fails to perform, to the consequences which would have resulted from nonperformance, had the act of the assumed agent been authorized,<sup>23</sup> for the third person, being ignorant whether the act will be ratified, is obliged to perform at his

<sup>22</sup> See *Lyell v. Kennedy*, L. R. 14 App. Cas. 437, at page 462 (1889).

<sup>23</sup> "On the other hand, if the act done by such person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses, for the non-performance of that act or duty, or would defeat a right or an estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it, so as to bind the third person to the consequences." Story, Ag. § 246. See 5 Harv. Law Rev. 19; 9 Harv. Law Rev. 60, at page 62; Wright, Prin. and Ag. 49.

own risk, and will be without protection if the principal disavows the act. The courts have frequently recognized an exception to the doctrine of relation in such cases, although the exception is not clearly defined or universally recognized.<sup>24</sup> Thus, it has been held that an unauthorized notice to quit does not become binding upon a tenant by ratification,<sup>25</sup> at least if he fails to act upon it.<sup>26</sup> "A ratification given afterwards will not do in this case," said Lord Ellenborough in *Right v. Cuthell*,<sup>27</sup> "because the tenant

<sup>24</sup> Mr. Wharton suggests the uncertain test of "moral" certainty. "In all cases in which it is morally sure the principal will ratify, other parties are bound to treat the intervener—the negotiorum gestor—as an agent. In cases where the ratification of the principal may be regarded as doubtful, the intervener may be treated as a mere interloper." Wharton, Ag. § 80. This distinction is approved in *Farmers' Loan & Trust Co. v. Railroad Co.*, 83 Fed. 870 (C. C. 1897), in which case the facts were as follows: Under a provision in a railroad mortgage that, on default in payment of any installment of interest, continuing for 60 days, the holders of one-third in amount of the bonds secured might declare the principal due, by an instrument executed by them "or their attorneys in fact thereto duly authorized," and delivered to the trustee, such a declaration of maturity was signed by a person as attorney in fact of his wife and two brothers, who were bondholders. He had no written authority, but an instrument ratifying his act was executed by the persons for whom he acted after the filing of a bill of foreclosure by the trustees. Held, that such ratification rendered effective the act of the attorney as against the mortgagor and a second mortgagee. Lurton, J., after referring to Mr. Wharton's distinction, said: "Applying this to the defendants, they must be regarded as bound by the ratification, which in view of the relationship borne by D. Willis James to those he assumed to represent, and the obvious interest they have in ratifying what he did, can be no surprise to them." See *Johnson v. Johnson*, 31 Fed. 700, 702 (C. C. 1887).

<sup>25</sup> *Right v. Cuthell*, 5 East, 491, 102 Rep. 1158 (1804); *Doe v. Walters*, 10 B. & C. 626, 109 Rep. 583 (1830); *Brahn v. Forge Co.*, 38 N. J. Law, 74 (1875) *semble*; *Pickard v. Perley*, 45 N. H. 188, 86 Am. Dec. 153 (1864). Contra: *Roe v. Pierce*, 2 Camp. 96 (1809); *Goodtitle v. Woodward*, 3 B. & Ald. 689, 106 Rep. 813 (1820).

<sup>26</sup> In cases which would otherwise fall within this exception, if the third person recognizes the assumed authority, clearly the reason for denying full effect to a subsequent ratification fails.

<sup>27</sup> 5 East, 491, at page 498, 102 Rep. 1158 (1804).

was entitled to such a notice as he could act upon with certainty at the time it was given, and he was not bound to submit himself to the hazard whether the third coexecutor chose to ratify the act of his companions or not." And Lawrence, J., said in the same case:<sup>28</sup> "The rule of law, that 'omnis ratihabitio retrotrahitur,' etc., seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on whether there be a subsequent ratification." So, it seems, an unauthorized demand, though ratified, will not support an action, for the other party has a right to know whether he may safely pay or deliver to the person making demand.<sup>29</sup> On the other hand, it has been held that the bringing of an action may be subsequently ratified by the party on whose behalf it is brought,<sup>30</sup> although some courts, with what appears to be the better reason, have held that the principal cannot, by ratification, take away from the defendant a defense which he had at the commencement of the action.<sup>31</sup>

<sup>28</sup> Id. at page 499.

<sup>29</sup> Solomons v. Dawes, 1 Esp. 83 (1794); Coles v. Bell, 1 Camp. 478, note (1808); Story Ag. § 247.

But it has been held that bringing suit founded on an unauthorized demand is a ratification, and that the demand is sufficient unless the authority to make it was brought in question by the party sought to be charged at the time. Payne v. Smith, 12 N. H. 34 (1841); Town of Grafton v. Follansbee, 16 N. H. 450, 41 Am. Dec. 736 (1844); Ham v. Boody, 20 N. H. 411, 51 Am. Dec. 235 (1845). Notice of dishonor of a bill or note by a stranger, though ratified, does not bind a drawer or indorser. Stewart v. Kennett, 2 Camp. 177 (1809); Chanoine v. Fowler, 3 Wend. 173 (N. Y. 1829).

<sup>30</sup> Marr v. Plummer, 3 Greenl. 73 (Me. 1824); Persons v. McKibben, 5 Ind. 261, 61 Am. Dec. 85 (1854); Farmers' Loan & Trust Co. v. Railroad Co., 83 Fed. 870 (C. C. 1897).

Where the holder of a bill indorsed it, and delivered it to a solicitor, who at his request brought suit on it in the name of Ancona, it was held that his ratification after suit begun entitled him to maintain the action. Ancona v. Marks, 7 H. & N. 686, 158 Rep. 645 (1862).

Cf. Farrand Co. v. Huston, 110 Miss. 40, 69 South. 997 (1915);

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<sup>31</sup> See note 31 on following page.

## EFFECTS OF RATIFICATION—NECESSITY FOR NEW ASSENT

62. Jurisdictions differ as to whether the power of P. to ratify is absolute or conditioned upon the continued willingness of T.

The effect of ratification of a contract is to invest the principal with all the obligations of an original party to it.<sup>32</sup> The third party may enforce the contract, and has all the incidental rights that he would possess had the person actually dealing with him been the principal himself. If, for example, the agent induced the third party to sell by means of false representations, the seller has the same right to rescind or to affirm, and otherwise to hold the principal

*Hoppe v. Russo-Asiatic Bank*, 200 App. Div. 460, 193 N. Y. Supp. 250 (1922).

<sup>31</sup> *Wittenbrock v. Bellmer*, 57 Cal. 12 (1880); *Dingley v. McDonald*, 124 Cal. 682, 57 Pac. 574 (1899). A notice of appeal served in due time, but without authority, held not capable of ratification after time to appeal has passed. *TITLE INS. & TRUST CO. v. CALIFORNIA DEVELOPMENT CO.*, 168 Cal. 397, 143 Pac. 723, Powell, Cas. Agency, 159 (1914).

Where an agent without authority paid plaintiff a debt due him from defendant out of moneys of defendant, but defendant repudiated the payment, and plaintiff sued on the debt, a ratification, after suit brought, could not operate retroactively, so as to defeat the action. *Fiske v. Holmes*, 41 Me. 441 (1856).

Civ. Code Prac. Ky. § 550, providing that, in the absence of the plaintiff, the affidavit required by the statute for a writ of attachment may be made by his agent or attorney, intends an existing relation at the time the affidavit is filed, and ratification subsequent to issuance of the writ will not sustain it. *Johnson v. Johnson*, 31 Fed. 700 (C. C. 1887).

Ratification of unauthorized signing of plaintiff's name to an attachment bond does not relate back so as to sustain the attachment. *Grove v. Harvey*, 12 Rob. 221 (La. 1845). Contra: *Bank of Augusta v. Courey*, 28 Miss. 667 (1855).

<sup>32</sup> *Fleckner v. Bank of United States*, 8 Wheat. 338, at page 363, 5 L. Ed. 631 (U. S. 1823); *Lawrence v. Taylor*, 5 Hill, 107 (N. Y. 1843); *Starks v. Sikes*, 74 Mass. (8 Gray) 609, 69 Am. Dec. 270 (1857); *Hankins v. Baker*, 46 N. Y. 666 (1871); *United States Express Co. v. Rawson*, 106 Ind. 215, 6 N. E. 337 (1886).

answerable for the fraud, that he would have possessed against the principal acting in person.<sup>33</sup>

By a reasonable application of the doctrine of ratification it should follow that, upon the election of the principal to adopt a contract made on his behalf, the third party becomes bound for its performance. The authorities are not agreed, however, upon this proposition, and some cases have held that, since mutual assent is essential to a contract, it cannot rest with the party ratifying to bind the other party to an executory contract, and that he can be bound only by some act signifying his present consent to be bound.<sup>34</sup> "There is a broad and manifest difference between a case in which a party seeks to avail himself by subsequent assent of the unauthorized act of his own agent in order to enforce a claim against a third person and the case of a party acquiring an inchoate right against a principal by an unauthorized act of his agent, to which validity is afterwards given by the assent or recognition of the principal. The principal in such case may, by his subsequent assent, bind himself; but, if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent against the principal, which, if he does, the contract, by virtue of such mutual ratification becomes mutually obligatory."<sup>35</sup> The fallacy of this reasoning, it is submitted, lies in applying to the anomalous doctrine of ratification the test of mutual

<sup>33</sup> *Lane v. Black*, 21 W. Va. 617 (1883); *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701 (1893).

<sup>34</sup> *Dodge v. Hopkins*, 14 Wis. 630 (1861); *Atlee v. Bartholomew*, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103 (1887); *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322, at page 327 (1905); *Jackson Brewing Co. v. Canton*, 118 La. 823, 43 South. 454 (1907). Cf. *Townsend v. Corning*, 23 Wend. 435 (N. Y. 1840).

This doctrine is supported in a modified form by Mr. Mecham in his work on Agency (2d Ed.) § 522, and in 24 Am. Law Rev. 580. It is adversely criticized in note on *Atlee v. Bartholomew* in 5 Am. St. Rep. 113; 25 Am. Law Rev. 74; 9 Harv. Law Rev. 60, at page 64.

<sup>35</sup> *Dodge v. Hopkins*, 14 Wis. 630, at page 638; *Dixon, C. J.* (1861). Cf. *Oliphant*, 19 Mich. Law Rev. 358, at page 361.

assent.<sup>36</sup> Undoubtedly, a contract which requires ratification, like other contracts, must rest on mutual assent. But in the case under consideration the assent of the other party is given in advance. It is true that until ratification the contract is not binding because of the absence of assent on the part of the assumed principal, but by ratifying the contract he assents to it, and the assent then becomes mutual, and the contract by relation mutually binding as of the date it was entered into by the assumed agent.<sup>37</sup>

#### EFFECTS OF RATIFICATION—POWER OF T. TO WITHDRAW PRIOR TO RATIFICATION

63. The weight of authority permits T. to withdraw at any time prior to ratification. Some jurisdictions permit T. to withdraw even after ratification, and England seems to deny the right to withdraw prior to ratification.

A question closely connected with that discussed in section 62 is whether the other party to an unauthorized con-

<sup>36</sup> Courts so holding regard the unauthorized transaction wholly nugatory. See Wambaugh, 9 Harv. Law Rev. 60, at page 65, and Cowan v. Curran, 216 Ill. 598, 75 N. E. 322, at page 327 (1905).

<sup>37</sup> McClintock v. Oil Co., 146 Pa. 144, 23 Atl. 211, 28 Am. St. Rep. 785 (1892); post, page 168.

In Hagedorn v. Oliverson, 2 M. & S. 485, 105 Rep. 461 (1814), where plaintiff, without authority, procured an insurance upon a ship for the benefit of the owner, who ratified after a loss had occurred and was known, it was held that an action was maintainable on the policy for his benefit. See, also, Routh v. Thompson, 13 East, 274, 104 Rep. 375 (1811); Finney v. Insurance Co., 46 Mass. (5 Metc.) 192, 38 Am. Dec. 397 (1842).

These cases involving insurance of the marine type are exceptional, in that they give full effect to the ratification, notwithstanding that the principal would not then be able to make the same contract as that ratified. This was recognized in Williams v. North China Ins. Co., L. R. 1 C. P. D. 757, at page 764 (1876). In England this is strictly limited to marine insurance. Grover, etc., Ltd., v. Mathews, [1910] 2 K. B. 401, *supra*, footnote 42, p. 139.

So, where a life insurance policy expressly provided that it should

tract may withdraw from it before ratification.<sup>38</sup> In jurisdictions where it is held that the assent of the other party to be bound by the contract, even after ratification, is requisite, the question is, of course, answered in the affirmative.<sup>39</sup> In England, on the other hand, the doctrine of relation has been recently pushed to an extreme limit, and it has been held that ratification by the assumed principal is effective to bind the other party to the contract, notwithstanding that he has in the meantime withdrawn his assent. Thus, where an offer was accepted without authority by the managing director of a company on its behalf, and before ratification the other party gave notice that he withdrew his offer, it was held that the subsequent ratification related back to the time of acceptance, and rendered the withdrawal inoperative. Lindley, C. J., said: "I can find no authority in the books to warrant the contention that an offer made, and in fact accepted by a principal, through an agent or otherwise, can be withdrawn. The true view, on the contrary, appears to be that the doctrine as to the retrospective action of ratification is applicable. If we look to Mr. Brice's argument closely, it will be found to turn on this: That the acceptance was a nullity, and, unless we are prepared to say that the acceptance of the agent was absolutely a nullity, Mr. Brice's contention cannot be accepted. \* \* \* I see no reason to take this case out of the application of the general principle as to ratification."<sup>40</sup> The effect of this decision is that between

not take effect until the advance premium should have been paid during the lifetime of the insured. It was held that an unauthorized payment of the premium during his life could not be ratified by his administrator. *Whiting v. Insurance Co.*, 129 Mass. 240, 37 Am. Rep. 317 (1880). Cf. *Dibbins v. Dibbins*, [1896] L. R. 2 Ch. 348.

<sup>38</sup> Thoroughly discussed by Wambaugh, 9 Harv. Law Rev. 60-71, and by note in 12 Col. Law Rev. 454.

<sup>39</sup> See section 62, *supra*.

<sup>40</sup> *Bolton Partners v. Lambert*, L. R. 41 Ch. D. 295 (1889), followed by *In re Portuguese Consolidated Copper Mines*, L. R. 45 Ch. D. 16 (1890). In *Fleming v. Bank of New Zealand*, [1900] A. C. 577, at page

the time of the unauthorized contract and its ratification the other party is contingently bound, although the principal is not bound.<sup>41</sup> It seems possible, however, to give effect to the principle as to ratification without doing violence to the principle requiring contracts to be based on mutual assent, by holding that the ratification is not effective to make the contract binding upon the other party if he has in the meantime withdrawn his assent, but that, unless it be withdrawn, being an assent to what purports to be a contract, and not in form a mere offer, the assent continues, the contract thus becoming binding upon ratification by mutual assent.<sup>42</sup>

587 the Judicial Committee of the Privy Council reserved liberty to reconsider these cases.

Cf. *In re Tiedemann and Ledermann Frères*, [1899] 2 Q. B. 66, and *Andrews v. Insurance Co.*, 92 N. Y. 596 (1883).

This case has been adversely criticized. See Wright, *Prin. and Ag.* (2d Ed.), page 81; Bowstead, *Ag.* (1919 Ed.) p. 56; Campbell, *Sale of Goods and Com. Ag.* 238; Fry, *Specific Perf.* (6th Ed.) 733, 5 Law Q. Rev. 440, 3 Harv. Law Rev. 91, 9 Harv. Law Rev. 60, at page 68.

Cases contra: *Baldwin v. Schiappacasse*, 109 Mich. 170, 66 N. W. 1091 (1896); *Kline Bros. & Co. v. Royal Ins. Co.*, 192 Fed. 378, at page 386 (C. C. 1911), and cases collected in 4 Mich. Law Rev. 269, at page 276.

Cf. *Marqusee v. Hartford Life Ins. Co.*, 198 Fed. 475, 119 C. C. A. 251, 42 L. R. A. (N. S.) 1025 (1912), affirmed 229 U. S. 621, 33 Sup. Ct. 1049, 57 L. Ed. 1355 (1913).

But acceptance by an agent, acting without authority, of an option of purchase, which has to be exercised within a limited time, is not made effective by ratification after the time has expired. *Dibbins v. Dibbins*, [1896] L. R. 2 Ch. 348.

<sup>41</sup> "It comes to this: That if an offer to purchase is made to a person who professes to be the agent for a principal, but who has no authority to accept it, the person making the offer will be in a worse position as regards withdrawing it than if it had been made to the principal, and the acceptance of the unauthorized agent in the meantime will bind the purchaser to his principal, but it will not in any way bind the principal to the purchaser." *In re Portuguese Consolidated Copper Mines*, L. R. 45 Ch. Div. 16, at page 21, per North, J.

<sup>42</sup> This view finds support, even in England, in the earlier case of *Walter v. James*, L. R. 6 Ex. 124 (1871). In that case an agent, after

### EFFECTS OF RATIFICATION—ON LIABILITIES OF THE AGENT FOR HIS UNAUTHOR- IZED ACT

64. When an act has been ratified effectively, the agent has the same rights and liabilities with respect to the principal and the same exemption from liability as to the third person as if the act had been authorized.

By the doctrine of relation, ratification invests both principal and agent, as a rule, with the same rights and duties as if the transaction had been previously authorized. If the principal elects to ratify, he assumes the burdens that are incidental to adoption of the agent's act. Hence the agent

revocation of his authority, paid money on behalf of his principal to a creditor, who afterwards returned it to the agent at his request. In an action by the creditor against the principal to recover his debt the defendant pleaded payment, but it was held that it was competent for the assumed agent and the third party to cancel the transaction, and that consequently the ratification by plea of payment was too late. But, if the third party may withdraw his assent before ratification, with consent of the agent, who obviously has no power to cancel the transaction, it follows that he may withdraw his assent by communicating his withdrawal to the principal, irrespective of the agent's consent. See, also, 12 Col. Law Rev. 454.

"In an action to recover the price, it was held that signing the assignment was a ratification by plaintiff, and that it became binding without acceptance by defendant. Mitchell, J., said: 'The objection of want of mutuality is not good in many cases of dealing with an agent, for if he exceeds his authority, actual and apparent, his principal will not be bound, yet may ratify, and then the other party will be bound from the inception of the agreement. The aggregation of the parties need not commence simultaneously. It must coexist, but there must be a period when the question of contract or no contract rests on the will of one party to accept or reject a proposition made, and this interval may be long or short. The offer, of course, may be revoked or withdrawn at any time prior to acceptance, but after acceptance it is too late.'" *McClintock v. Oil Co.*, 146 Pa. 144, 23 Atl. 211, 28 Am. St. Rep. 785 (1892). See able discussion of this question by Professor Wambaugh, 9 Harv. Law Rev. 60. See, also, cases cited as contra to *Bolton Partners v. Lambert* in footnote 40. p. —, *supra*.

may look to the principal for compensation<sup>43</sup> and indemnity.<sup>44</sup> And by the ratification the principal ordinarily absolves the agent from all responsibility to P. on account of the unauthorized transaction, whether he was an agent who exceeded or departed from his instructions or a mere volunteer.<sup>45</sup> The ratification must, of course, be made with knowledge of the material facts, for otherwise it will not be binding,<sup>46</sup> whether the want of knowledge arose from concealment or misrepresentation of the agent or from his mere innocent inadvertence.<sup>47</sup> It has been held, however, that an adoption of an agent's unauthorized act in order to make the loss as small as possible is not such a ratifi-

<sup>43</sup> Wilson v. Dame, 58 N. H. 392 (1878); Goss v. Stevens, 32 Minn. 472, 21 N. W. 549 (1884); United States Mortg. Co. v. Henderson, 111 Ind. 24, 12 N. E. 88 (1887).

Where the managing owner of a ship sold her through his agent, and his co-owners ratified the sale, they were jointly liable to the agent for his commission. Keay v. Fenwick, L. R. 1 C. P. D. 745 (1876).

Where a real estate agent departs from his authority in effecting a sale, upon ratification the compensation fixed in the original contract of employment controls. Gelatt v. Ridge, 117 Mo. 553, 23 S. W. 822, 38 Am. St. Rep. 683 (1893).

<sup>44</sup> Where an agent defended an action brought against him for breach of a contract entered into by him on behalf of his principal, who ratified what had been done, it was held that he must indemnify the agent against the damages and costs recovered against him in the action. Frixione v. Tagliaferro, 10 Moore, P. C. 175 (1856); BLACKWELL v. KERCHEVAL, 27 Idaho, 537, 149 Pac. 1060, Powell, Cas. Agency, 161 (1915).

<sup>45</sup> Smith v. Cologan, 2 T. R. 188, note 100 Rep. 102, note (1788); Woodward v. Suydam, 11 Ohio, 360 (1842); Pickett v. Pearsons, 17 Vt. 470 (1845); Ward v. Warfield, 3 La. Ann. 468 (1848); Aetna Ins. Co. v. Sabine, 6 McLean, 393, Fed. Cas. No. 97 (U. S. 1855); Menkens v. Watson, 27 Mo. 163 (1858); Hanks v. Drake, 49 Barb. 186 (N. Y. 1867); Clay v. Spratt, 70 Ky. (7 Bush) 334 (1870); Bray v. Gunn, 53 Ga. 144 (1874); HALLOWAY v. ARKANSAS CITY MILLING CO., 77 Kan. 76, 93 Pac. 577, Powell, Cas. Agency, 165 (1908); text approved in Osborne v. Durham, 157 N. C. 262, 72 S. E. 849 (1911).

<sup>46</sup> See section 51, supra.

<sup>47</sup> Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516 (1868); Bank of Owensboro v. Bank, 76 Ky. (13 Bush) 526, 26 Am. Rep. 211 (1877); Story, Ag. § 243.

cation as will relieve the agent;<sup>48</sup> in other words, that in such a case the law will not apply the doctrine of relation for the benefit of an agent, who has placed the principal in a position where he is forced to ratify to reduce his loss. And where an agent for collection, who was instructed to remit by express, purchased a check drawn on parties in good standing in New York, and forwarded it to his principal, who sent it to New York for collection, but before it was presented the drawers became insolvent, and the check was dishonored, it was held that sending the check for collection was not such a ratification as to absolve the agent for violating his instructions.<sup>49</sup> And if the principal delays action after knowledge of the facts at the request of the agent, so that his conduct is an implied ratification, the agent is not necessarily absolved from liability for his breach of duty.<sup>50</sup>

One who contracts as agent of another is deemed to warrant his authority. If the contract be authorized, the principal, and not the agent, is liable; but, if it turns out that the agent acted without authority, he must respond to the other party in damages.<sup>51</sup> Ratification, being equivalent to previous authority, relieves the agent from all liability to

<sup>48</sup> *Walker v. Walker*, 52 Tenn. (5 Heisk.) 425 (1871); *Triggs v. Jones*, 46 Minn. 277, 284, 48 N. W. 1113 (1891); *Mechem, Ag.* (2d Ed.) § 440.

<sup>49</sup> *Walker v. Walker*, 52 Tenn. (5 Heisk.) 425 (1871).

<sup>50</sup> In *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113 (1891), plaintiff intrusted to an agent a deed with instructions to deliver it to C. upon formation of a contemplated corporation and delivery to plaintiff of stock therein. The agent delivered the deed without fulfillment of the conditions, and C. conveyed to an innocent purchaser. The agent informed plaintiff of the delivery, and plaintiff did not at once repudiate, but joined in taking steps to form the corporation, which was finally abandoned. In an action to obtain a reconveyance and to recover damages against the agent, it was held that, because of the delay in repudiating, plaintiff was not entitled to a reconveyance, but that his conduct did not amount to such a ratification as to absolve the agent from liability for breach of instructions." See 5 Harv. Law Rev. 243.

<sup>51</sup> See sections 129, 130, infra.

the other party upon an unauthorized contract.<sup>52</sup> If the unauthorized act is a tort, ratification is, of course, powerless to relieve the assumed agent from responsibility,<sup>53</sup> unless the act was one which the principal might lawfully have done, in which case the ratification operates as a justification.<sup>54</sup>

<sup>52</sup> *Spittle v. Lavender*, 2 Brod. & B. 452, 129 Rep. 1041 (1821); *Sheffield v. La Due*, 16 Minn. 388 (Gil. 346), 10 Am. Rep. 145 (1871); *Berger's Appeal*, 96 Pa. 443 (1881); *Swearingen v. Bulger & Son*, 117 Ark. 557, 176 S. W. 328 (1915).

<sup>53</sup> *Richardson v. Kimball*, 28 Me. 463 (1848); *Perminter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177 (1851); *Hilbery v. Hatton*, 2 H. & C. 822, 159 Rep. 341 (1864). See section 136 infra.

<sup>54</sup> *Hull v. Pickersgill*, 1 Brod. & B. 282, 129 Rep. 731 (1819); *Whitehead v. Taylor*, 10 A. & E. 210, 113 Rep. 81 (1839).

## CHAPTER IX

### ACTS AND PARTIES

#### Acts Which Can be Performed Through an Agent—

- 65. General.
- 66. Illegal Object.
- Capacity to be Principal—
  - 67. General.
  - 68. Infants.
  - 69. Persons Non Compos Mentis.
  - 70. Married Women.
  - 71. Aliens, Corporations, and Associations.
- Capacity to be Agent—
  - 72. General.
  - 73. Infants.
  - 74. Persons Non Compos Mentis.
  - 75. Married Women.
  - 76. Adverse Interest.
  - 77. Licensing Statutes.
  - 78. Multiple Principals.
  - 79. Multiple Agents.

#### ACTS WHICH CAN BE PERFORMED THROUGH AN AGENT—GENERAL

65. Any act which a person can do in his own right, and which the law does not require specifically to be done personally, can be performed through an agent.

At common law, it was a general rule that whatever a person had power to do in his own right he could do through an agent, with the same legal consequences as if he had done the act in person.<sup>1</sup> However, it was recognized that some powers and privileges were so closely related to an individual's personality that an exercise through another would be improper.<sup>2</sup> This distinction was sound and still prevails. The restrictions upon an agent's dele-

<sup>1</sup> Combes' Case, 9 Co. 75 a (1614).

<sup>2</sup> Combes' Case, 9 Co. 75 a (1614).

gating to another the discharge of his duties as agent are an outgrowth of the distinction.<sup>3</sup> Many statutes have been passed requiring the doing of specified acts, such as the filing of an oath as to the ownership of specific property, the signing of a memorandum as to the terms of sale, and the execution of certificates of incorporation. Whether an act authorized or required by statute may be done by an agent depends upon the construction of the particular statute, in view of the language used and the nature of the act. Thus, where a law for the licensing of vessels required an oath of ownership by the owner, an oath by the master, acting as agent, was held to be insufficient.<sup>4</sup> And under Lord Tenterden's Act, requiring an acknowledgment or promise, in order to take a debt out of the statute of limitations, to be "signed by the party chargeable thereby," it was held that the signature must be personal, on the ground that the enactment was one of a series of enactments which made a distinction between a signature by the party and a signature by agent.<sup>5</sup> But in cases of acts or signatures required by statute it is generally held that one may act either personally or through an agent.<sup>6</sup> A clearly expressed statutory intent that the act be personal would, of course, prevail.

<sup>3</sup> Infra, chapter X.

<sup>4</sup> United States v. Bartlett, 2 Ware (Dav. 9) 17, Fed. Cas. No. 14532 (U. S. 1839).

<sup>5</sup> Hyde v. Johnson, 2 Bing. N. C. 776, 132 Rep. 299 (1836). So, also, under a statute giving an action on a written false representation as to the credit of another, an agent's signature is insufficient. Swift v. Jewsbury, L. R. 9 Q. B. 301 (1874).

<sup>6</sup> Reg. v. Justices of Kent, L. R. 8 Q. B. 305 (1873); In re Whitley Partners, Ltd., 32 Ch. D. 337 (1886); FINNEGAN v. LUCY, 157 Mass. 439, 32 N. E. 656, Powell, Cas. Agency, 167 (1892); Farrar v. Bell, 73 Vt. 342, 50 Atl. 1107 (1901); In re African Farms, Ltd., [1906] 1 Ch. 640; Porter v. Paving & Construction Co., 214 Mo. 1, 112 S. W. 235 (1908); Sperry & Hutchinson Co. v. Weigle, 169 Wis. 562, 173 N. W. 315 (1919).

## ACTS WHICH CAN BE PERFORMED THROUGH AN AGENT—ILLEGAL OBJECT

### 66. A contract of agency, which contemplates an illegal object, is void.

Certain classes of agreements, either because of the illegality of the object, or because certain requirements of the law have not been complied with, or for other reasons, are prohibited, and if for any reason an agreement falls within a prohibited class it is void. Any such agreement, since it would be inoperative and void if entered into by the principal in person, is, of course, void if entered into by medium of an agent. The power of an agent cannot rise higher than its source.

The effect of illegality upon the contract of agency is the same. If the agreement between principal and agent falls within a class of agreements which the law prohibits, either because of the illegality of the object contemplated, or for any other reason, the agreement is a nullity, and neither party acquires any of the rights incident to the formation of the relation of principal and agent.<sup>7</sup> The principles which determine the illegality of contracts of agency are the same as those which apply to other contracts, and do not call for separate treatment.<sup>8</sup> A few examples will serve for illustration.

The most obvious example of an illegal agency is an employment to commit a crime. "If one binds himself in an obligation to kill a man, burn a house, maintain a suit, or the like, it is void."<sup>9</sup> Among the agencies prohibited by

<sup>7</sup> Cheshire & Co. v. Vaughan Bros. & Co., [1920] 3 K. B. 240, and comment thereon in 34 Harv. Law Rev. 432.

<sup>8</sup> Pollock, Contr. (1902 Ed.) c. 7; Clark, Contr. (1904 Ed.) c. 8; Williston, Contr. (1920 Ed.) cc. 44-48, inclusive.

<sup>9</sup> Shep. Touchstone, 370. See, also, Arnold v. Clifford, 2 Sumn. 238, Fed. Cas. No. 555 (U. S. 1835); Shackell v. Rosier, 2 Bing. N. C. 634, 132 Rep. 245 (1836); Atkins v. Johnson, 43 Vt. 78, 5 Am.

public policy may be named those whose object is to procure administrative action by personal influence or corrupt means, as by such means to procure government contracts;<sup>10</sup> or pardons;<sup>11</sup> to procure appointment to office;<sup>12</sup> to influence by corrupt means the action of Legislatures, or lobbying contracts;<sup>13</sup> to impair the integrity of elections;<sup>14</sup> to obstruct the course of justice, as by suppressing evidence or obtaining false testimony;<sup>15</sup> to corrupt

Rep. 260 (1870). Cf. Jewett Pub. Co. v. Butler, 159 Mass. 517, 34 N. E. 1087 (1893).

<sup>10</sup> PROVIDENCE TOOL CO. v. NORRIS, 69 U. S. (2 Wall.) 45, 17 L. Ed. 868, Powell, Cas. Agency, 174 (1864); Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539 (1880); Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746 (1884); Drake v. Lauer, 93 App. Div. 86, 86 N. Y. Supp. 986, affirmed 182 N. Y. 533, 75 N. E. 1129 (1904).

"The court will not inquire what was done. If that should be improper, it probably would be hidden and would not appear. In its inception the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward." Holmes, J., in Hazelton v. Sheckells, 202 U. S. 71, at page 79, 26 Sup. Ct. 567, 50 L. Ed. 939, 6 Ann. Cas. 217 (1905).

<sup>11</sup> Hatzfield v. Gulden, 7 Watts, 152, 31 Am. Dec. 750 (Pa. 1838); Kribben v. Haycraft, 26 Mo. 396 (1858). Such agreements are not illegal when they do not have a tendency to pervert the application of the usual rules of law. Chadwick v. Knox, 31 N. H. 226, 64 Am. Dec. 329 (1855); Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060 (1889).

<sup>12</sup> Gray v. Hook, 4 N. Y. 449 (1851). Such agreements are illegal because of their tendency to introduce corrupt methods. McGuire v. Corwine, 101 U. S. 108, 25 L. Ed. 899 (1879); PROVIDENCE TOOL CO. v. NORRIS, supra.

<sup>13</sup> Brown v. Brown, 34 Barb. 533 (N. Y. 1861); Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535 (1869).

"We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services is valid. \* \* \* All these things are intended to reach only the reason of those sought to be influenced. \* \* \* But such services are separated by a broad line of demarcation from personal solicitation." Trist v. Child, 88 U. S. (21 Wall.) 441, at page 450, 22 L. Ed. 623 (1874).

<sup>14</sup> Nichols v. Mudgett, 32 Vt. 546 (1860).

<sup>15</sup> Gillet v. Logan County, 67 Ill. 256 (1873); Patterson v. Donner, 48 Cal. 369 (1874).

agents;<sup>16</sup> to influence the action of another by underhand means;<sup>17</sup> to procure a marriage for compensation;<sup>18</sup> to make a wagering contract, such as a deal in futures;<sup>19</sup> to purchase liquor;<sup>20</sup> and in general to do any act which is contrary to decency and morality.

It is obvious that jurisdictions are likely to differ as to what is contrary to decency and morality. The illegality of an act is determined by the law of the jurisdiction where the act is done.<sup>21</sup> The subject of illegality will be referred to again in connection with the mutual rights and duties of principal and agent.<sup>22</sup>

### CAPACITY TO BE PRINCIPAL—GENERAL

#### 67. Capacity to enter into a contract of agency, or to act by means of an agent, is coextensive with the capacity of the principal to contract.

There are certain persons whom the law declares incapable, wholly or in part, of entering into contracts, and their incapacity, of course, debars them equally from entering in-

<sup>16</sup> RICE v. WOOD, 113 Mass. 133, 18 Am. Rep. 459, Powell, Cas. Agency, 356 (1873); Harrington v. Dock Co., 3 Q. B. D. 549 (1878).

Contract to pay purchasing agent of firm 2½ per cent. on bills of merchandise sold firm invalid, as placing agent "under wrong influences." Atlee v. Fink, 75 Mo. 100, 42 Am. Rep. 385 (1881).

<sup>17</sup> Byrd v. Hughes, 84 Ill. 174, 25 Am. Rep. 442 (1876).

<sup>18</sup> Crawford v. Russell, 62 Barb. 92 (N. Y. 1872); Johnson's Adm'r v. Hunt, 81 Ky. 321 (1883); Duval v. Wellman, 124 N. Y. 156, 26 N. E. 343 (1891).

<sup>19</sup> Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225 (1884); Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159 (1889); Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862 (1891); Jamieson v. Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302 (1897).

<sup>20</sup> Mo Yaen v. State, 18 Ariz. 491, 163 Pac. 135, L. R. A. 1917D, 1014 (1917).

<sup>21</sup> American Banana Co. v. United Fruit Co., 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047 (1908).

<sup>22</sup> See section 162, infra.

to contracts of agency, or contracting by means of agents. As a rule, capacity to enter into a contract of agency, or to act or contract by an agent, is coextensive with capacity to contract. In the case of infants and persons non compos mentis, however, there are exceptions.

### CAPACITY TO BE PRINCIPAL—INFANTS

68. Although an infant's contracts are voidable, and not void, still it has been held many times that an infant's appointment of an agent is void, and not merely voidable. The present tendency is that such appointment is merely voidable.

It is a general rule of common law, as established by modern decisions, that the contracts of an infant are not void, but are voidable, at his option, either before or after he has attained his majority.<sup>23</sup> We should naturally expect this rule to prevail in respect to the contracts entered into by an infant through an agent. Nevertheless it has been laid down broadly by the cases that an infant cannot appoint an agent or attorney, and that any such appointment, and consequently all acts and contracts of the agent under such appointment, are absolutely void.<sup>24</sup>

<sup>23</sup> Clark, Contr. (1904 Ed.) §§ 91-94. Williston, Contr. (1920 Ed.) §§ 222-226; Wuller v. Chuse Grocery Co., 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522 (1909). Cf. Matter of Farley, 213 N. Y. 15, 106 N. E. 756, L. R. A. 1916D, 816, Ann. Cas. 1916C, 494 (1914), as to infant's consent to location of saloon under liquor tax law.

<sup>24</sup> Saunderson v. Marr, 1 H. Bl. 75, 126 Rep. 46 (1788); Pyle v. Cravens, 14 Ky. (4 Litt.) 17 (1823); Tucker v. Moreland, 35 U. S. (10 Pet.) 58, 9 L. Ed. 345 (1836); Bool v. Mix, 17 Wend. 120, 31 Am. Dec. 285 (N. Y. 1837); Lawrence's Lessee v. McArter, 10 Ohio, 37 (1840); Waples v. Hastings, 3 Har. 403 (Del. 1842); Doe v. Roberts, 16 M. & W. 778, 153 Rep. 1404 (1847); Cole v. Pennoyer, 14 Ill. 158 (1852); Knox v. Flack, 22 Pa. 337 (1853); TRUEBLOOD v. TRUEBLOOD, 8 Ind. 195, 65 Am. Dec. 756, Powell, Cas. Agency, 177 (1856); Armitage v. Widoe, 36 Mich. 124 (1877); Wambole v.

In the earlier decisions, courts held void an infant's contract if detrimental to the infant, but sustained such a contract if beneficial to the infant.<sup>25</sup> Later decisions, however, have generally repudiated this distinction, holding that an infant is amply secured by enabling him to prevent an enforcement of the contract during infancy, and by leaving to the infant the option to ratify or repudiate it after his majority.<sup>26</sup> Without any sufficient reason, the courts have continued to hold the contract under seal of an infant creating a power of attorney or authorizing another to confess judgment against the infant to be void.<sup>27</sup> In these cases the courts have said generally that an infant could not appoint an agent. The tendency of the later decisions is to confine these cases to their exact facts, and hence to allow the appointment of an agent by an infant to be voidable, and not void,<sup>28</sup> and some jurisdictions have overruled the older cases on their exact facts.<sup>29</sup> Thus it

Foote, 2 Dak. 1, 2 N. W. 239 (1878); Wainwright v. Wilkinson, 62 Md. 146 (1884); Smoot v. Ryan, 187 Ala. 396, 65 South. 828 (1914); Casey v. Kastel, 119 Misc. Rep. 116, 195 N. Y. Supp. 848 (1922), and comment thereon in 32 Yale L. J. 295. Cf. Grievance Com. v. Ennis, 84 Conn. 594, 80 Atl. 767 (1911).

But see McDonald v. City of Spring Valley, 285 Ill. 52, 120 N. E. 476, 2 A. L. R. 1359 (1918), in which this incapacity of an infant was held to exempt the infant from compliance with a statute requiring one about to sue a city for personal injuries to give notice within six months of the injury.

<sup>25</sup> Bottiller v. Newport, Y. B. 21 Hen. VI, 31; Zouch v. Parsons, 3 Burr. 1794, 97 Rep. 1103 (1765); Duvall v. Graves, 70 Ky. (7 Bush) 461 (1870); Story, Ag. § 6.

<sup>26</sup> Williston, Contr. (1920 Ed.) § 226.

<sup>27</sup> See cases in footnote 24, p. 178, supra.

<sup>28</sup> Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229 (1817); Hardy v. Waters, 38 Me. 450 (1853); Hastings v. Dollarhide, 24 Cal. 195 (1864); Towle v. Dresser, 73 Me. 252 (1882); Patterson v. Lippincott, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178 (1885); Coursole v. Weyerhauser, 69 Minn. 328, 72 N. W. 697 (1897); Ewell, The Void and Voidable Acts of Infants, 13 Am. Law Rev. 280, at page 287; Mecham, Ag. (1914 Ed.) § 145; Williston, Contr. (1920 Ed.) § 227. See, also, 1 Am. Lead. Cases (5th Ed.) 247, for a suggested, but unconvincing, justification of the old cases.

<sup>29</sup> "On principle, we think the power of attorney of an infant

has been held that an infant may authorize another to indorse a note, and that the indorsement, being voidable, may be ratified as if made by the infant in person.<sup>30</sup> Whether an act performed on behalf of an infant, but without authority, is capable of ratification, is decided by the court's conclusion as to whether the infant's appointment of an agent to do that act would be held voidable or void.<sup>31</sup>

#### CAPACITY TO BE PRINCIPAL—PERSONS NON COMPOS MENTIS

69. Although the contracts of a person non compos mentis are voidable, and not void, it has been held that the appointment of agent by one non compos mentis is void. However, contracts made by T. after P.'s incapacity, but in good faith, and in reliance upon representations made by P. before becoming non compos mentis, are held binding.

The modern rule of the common law is that the contract of a lunatic or other person non compos mentis, like that of an infant, is not void, but is voidable, at his option. It may be ratified or disaffirmed by the lunatic on recovery of his sanity, or by his guardian or other representative.

and the acts and contracts made under it should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect capacity, is voidable, as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void." Mitchell, J., in *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697 (1897).

See, also, *Johannsson v. Gudmundson*, 11 West Law Rep. 176 (Manitoba, 1909); *Benson v. Tucker*, 212 Mass. 60, 98 N. E. 589, 41 L. R. A. (N. S.) 1219 (1912).

Cf. *Matter of Farley*, 213 N. Y. 15, 106 N. E. 756, L. R. A. 1916D, 816, Ann. Cas. 1916C, 494 (1914).

<sup>30</sup> *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229 (1817); *Hardy v. Waters*, 38 Me. 450 (1853).

<sup>31</sup> See supra, § 50.

The principal difference between the contract of a lunatic and that of an infant is that, if the other party did not know, or have reasonable cause to know, of the lunatic's condition of mind, and acted in good faith, and the contract has been so far executed that the parties cannot be placed in *statu quo*, it cannot be avoided.<sup>32</sup> The leading case on this point is *Molton v. Camroux*,<sup>33</sup> the principle of which has generally, though not universally, been followed in this country.<sup>34</sup> This has been called a decision of necessity, as a contrary doctrine would render unsafe all ordinary dealings between man and man. If, however, the lunatic restores, or offers to restore, the consideration which he has received, the necessity ceases, and he may avoid the contract.<sup>35</sup> It has been held by some courts that the deed of an insane person is absolutely void, but in most jurisdictions no distinction in this respect is made between a deed and a simple contract, and his deed is held to be voidable, and not void.<sup>36</sup> The contractual capacity of a lunatic or insane person under guardianship depends upon statute, and differs in different states. In most jurisdictions contracts of a person who has been judicially declared insane and placed under guardianship are void.<sup>37</sup>

Upon principle, we should naturally expect the general rule that the contract of a person *non compos mentis* is

<sup>32</sup> Williston, *Contr.* (1920 Ed.) § 254; Pollock, *Contr.* (7th Ed.) pp. 93-95; Clark, *Contr.* p. 181 ff.

<sup>33</sup> 2 Ex. 487, 154 Rep. 584 (1848), affirmed 4 Ex. 17, 154 Rep. 1107 (1849).

<sup>34</sup> For citation of cases, see Williston, *Contr.* (1920 Ed.) p. 495, footnote 46.

<sup>35</sup> *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716 (1874); *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249 (1890); *Warfield v. Warfield*, 76 Iowa, 633, 41 N. W. 383 (1889); *Myers v. Knabe*, 51 Kan. 720, 33 Pac. 602 (1893).

<sup>36</sup> Williston, *Contr.* (1920 Ed.) § 251.

<sup>37</sup> Williston, *Contr.* (1920 Ed.) § 257. So, of course, such a person cannot act through an agent. *Lee v. Morris*, 66 Ky. (3 Bush) 210 (1868); *Gillet v. Shaw*, 117 Md. 508, 83 Atl. 394, 42 L. R. A. (N. S.) 87 (1912).

voidable, and not void, to apply to the contract of agency, and also to a contract entered into by an agent on behalf of an insane principal; nevertheless it has generally been declared that an insane person cannot appoint an agent,<sup>38</sup> and it has been held by the Supreme Court of the United States that a power of attorney executed by a lunatic is absolutely void.<sup>39</sup> It is to be observed, however, that the rule which declares the contracts of insane persons voidable, and not void, is of comparatively recent origin, and its application to agency has as yet received little attention. While it is a rule that insanity of the principal terminates the authority of the agent,<sup>40</sup> it has been held that a principal who has become insane after holding out another as agent is nevertheless bound by an executed contract which a third person, in ignorance of the insanity and in reliance upon the holding out, has entered into with the agent, although the insanity was known to the agent. This was in *Drew v. Nunn*,<sup>41</sup> which was placed upon the ground that the holding out is a representation upon which the third person has a right to act until he received notice that it is withdrawn. "The defendant became insane," said Brett, L. J.,<sup>42</sup> "and was unable to withdraw the authori-

<sup>38</sup> *Stead v. Thornton*, 3 B. & Ad. 357, note (a), 110 Rep. 134, note A (1832); *Tarbuck v. Bispham*, 2 M. & W. 2, 150 Rep. 643 (1836); *Dexter v. Hall*, 82 U. S. (15 Wall.) 9, 21 L. Ed. 73 (1872); *Story, Ag.* § 6.

A husband is liable quasi ex contractu for necessaries supplied to his wife during his insanity. *Read v. Legard*, 6 Ex. 636, 155 Rep. 698 (1851). See footnote 69, p. 58, in chapter III.

<sup>39</sup> *Dexter v. Hall*, 82 U. S. (15 Wall.) 9, 21 L. Ed. 73 (1872). The reasoning in this case tends to prove that the contract of a lunatic is void. See, also, *McClun v. McClun*, 176 Ill. 376, 52 N. E. 928 (1898).

<sup>40</sup> See section 87, *infra*.

<sup>41</sup> L. R. 4 Q. B. D. 661 (1879).

<sup>42</sup> *Drew v. Nunn*, L. R. 4 Q. B. D. 661 (1879). He also observes: "It is difficult to assign the ground upon which this doctrine, which, however, seems to me to be the true principle, exists. It is said that the right to hold the insane principal liable depends upon con-

ty, \* \* \* and where one of two persons, both innocent, must suffer by the wrongful act of a third person, that person making the representation which, as between the two, was the original cause of the mischief, must be the sufferer, and must bear the loss." Perhaps no better ground can be assigned than that suggested in explanation of *Molton v. Camroux*, that it is a decision of necessity, as a contrary doctrine would render ordinary dealings between man and man unsafe. From the decision in *Drew v. Nunn* it would be but a short step to the doctrine that the appointment of an agent by an insane principal is voidable, and not void. And, although the insanity had existed at the time of the agent's appointment, if neither the agent nor the third person were aware of it when they contracted, it would seem that the doctrine of *Molton v. Camroux* might well apply, and that the principal should be liable upon the contract if it was executed, and the other party could not be placed in *statu quo*.<sup>43</sup>

The rules in regard to the contracts of a man who is so

tract. I have difficulty in assenting to this. \* \* \* I cannot see that an estoppel is created."

"The act of the agent in execution of the power, however, will not in all cases be avoided on account of the incapacity. If the principal has enabled the agent to hold himself out as having authority by a written letter of attorney or by previous employment, and the incapacity of the principal is not known to those who deal with the agent, within the scope of the authority he appears to possess, the transaction may be valid and binding upon the principal. Such cases form an exception to the rule, and the principal, and those claiming under him, may be precluded from setting up his insanity as a revocation, because he has given the agent power to hold himself out as having authority, and because the other party has acted in good faith and in ignorance of any termination of it." *Davis v. Lane*, 10 N. H. 156, at page 160 (1839), per Parker, C. J.

*Bunce v. Gallagher*, 5 Blatchf. 481, 489, Fed. Cas. No. 2,133 (U. S. 1867); *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536 (1876); *Hill's Ex'r's v. Day*, 34 N. J. Eq. 150 (1881); *Merritt v. Merritt*, 43 App. Div. 68, 59 N. Y. Supp. 357 (1899).

<sup>43</sup> Mechem, Ag. (1914 Ed.) §§ 134, 135.

intoxicated as not to know what he is doing are the same as those applicable to insane persons. His contracts are voidable, but not void, and hence may be ratified by him when sober.<sup>44</sup> Upon principle, it would seem that the appointment of an agent by a drunken man is voidable, and not void.

Whether an unauthorized act done on behalf of a person non compos mentis may be ratified by him after recovery from his disability must depend upon whether the appointment of an agent by such person is to be deemed voidable or void.<sup>45</sup>

#### CAPACITY TO BE PRINCIPAL—MARRIED WOMEN

70. At common law a married woman had no capacity to contract, and hence could not be a principal. This incapacity has been largely eliminated by statute, but to the extent that the general incapacity to contract persists in any jurisdiction to that extent the incapacity of a married woman to be a P. continues.

At common law a married woman was, as a rule, incapable of binding herself by a contract, and her contract was void. Incompetent to act herself, she could not act through the medium of an agent, and her appointment of an agent was void.<sup>46</sup> In most jurisdictions, however, the common-

If the agent was aware of the insanity, although the third person was not, there would perhaps be less reason for holding the principal liable. In such case, it seems the agent would be liable to the third person upon his so-called warranty of authority. *Drew v. Nunn*, L. R. 4 Q. B. D. 661, per Brett, L. J. (1879). See sections 130 and 131, *infra*.

<sup>44</sup> Williston, Contr. (1920 Ed.) § 259; Clark, Contr. (1904 Ed.) p. 186 ff.

<sup>45</sup> *Ante*, § 50.

<sup>46</sup> *Oulds v. Sansom*, 3 Taunt. 261, 128 Rep. 104 (1810); *Brittin v. Wilder*, 6 Hill, 242 (N. Y. 1843); *Henchman v. Roberts*, 2 Har.

law disabilities of married women have been partly or wholly removed, with the result that to the extent to which they may act or contract in person they may generally act or contract by agent, and are bound by the acts of their agents within the limits of the authority conferred.<sup>47</sup> Conversely, the removal of the disabilities of married women has imposed upon them corresponding liabilities, among them the liability of a principal, when they have held out another as agent.<sup>48</sup> Ordinarily a married woman may appoint her husband an agent,<sup>49</sup> although under some statutes this power is denied her.<sup>50</sup>

It must always be borne in mind that the capacities of married women are created by statute, and that their acts performed by means of agents are binding upon them only within the limits of the capacity so created.<sup>51</sup> "The disabilities of a married woman are general, and exist at common law. The capabilities are created by statute. \* \* \* It is for him who asserts the validity of a contract of a

<sup>47</sup> (Del. 1836); *Caldwell v. Walters*, 18 Pa. 79, 55 Am. Dec. 592 (1851).

<sup>48</sup> *Weisbrod v. Railway Co.*, 18 Wis. 35, 86 Am. Dec. 743 (1864); *McLaren v. Hall*, 26 Iowa, 297 (1869); *Baum v. Mullen*, 47 N. Y. 577 (1872); *Patten v. Patten*, 75 Ill. 446 (1874); *Porter v. Haley*, 55 Miss. 66, 30 Am. Rep. 502 (1877); *Vail v. Meyer*, 71 Ind. 159 (1880); *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 36 Atl. 1003, 56 Am. St. Rep. 436 (1897); *Chamberlain v. Brown*, 141 Iowa, 540, 120 N. W. 334 (1909); *Stout v. Perry*, 152 N. C. 312, 67 S. E. 757, 136 Am. St. Rep. 826 (1910); *Porter v. Taylor*, 64 Fla. 100, 59 South. 400 (1912); *Barber v. Keeling*, 204 S. W. 139 (Tex. Civ. App. 1918); *Williston, Contr.* (1920 Ed.) § 269.

<sup>49</sup> *Bodine v. Killeen*, 53 N. Y. 93 (1873); *Hoene v. Pollak*, 118 Ala. 617, 24 South. 349, 72 Am. St. Rep. 189 (1897).

<sup>50</sup> *Weisbrod v. Railway Co.*, 18 Wis. 35, 86 Am. Dec. 743 (1864), and other cases in footnote 47, p. 185, *supra*.

<sup>51</sup> *Sanford v. Johnson*, 24 Minn. 172 (1877).

<sup>51</sup> *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38 (1877); *Kenton Ins. Co. v. McClellan*, 43 Mich. 564, 6 N. W. 88 (1880); *Troy Fertilizer Co. v. Zachry*, 114 Ala. 177, 21 South. 471 (1896).

The extent of these existent limitations is set forth in a summary of the legislation of the different states in *Williston, Contr.* (1920 Ed.) § 269.

feme covert by evidence to bring it within the exceptions."<sup>52</sup> And while it is generally true that what a person has a right to do himself he may authorize another to do for him, it does not necessarily follow that because power to act in person has been conferred by statute the power may be exercised by agent or attorney.<sup>53</sup> Whether this result follows depends upon the terms of the enabling statute. Frequently such statutes have been construed with extreme strictness. Thus, under statutes empowering a married woman to convey her lands by deed executed by herself and her husband, and requiring her separate examination and acknowledgment to be certified thereon, it has been held in numerous cases that she can convey only in the manner prescribed, and that a deed executed on behalf of husband and wife by attorney, pursuant to a power of attorney executed by them jointly and acknowledged and certified in the manner required for a deed, is inoperative to convey her title.<sup>54</sup> A more liberal construction of like statutory provisions was adopted by the Supreme Court of the United States, and a similar power was sustained, upon the ground that there was nothing in the terms of the statute to exclude the natural implication that a power to convey includes the power to appoint another to make the conveyance.<sup>55</sup> A consideration

<sup>52</sup> *Nash v. Mitchell*, 71 N. Y. 199, at page 204, 27 Am. Rep. 38 (1877).

<sup>53</sup> See section 65, *supra*.

<sup>54</sup> *Sumner v. Conant*, 10 Vt. 9 (1836); *Lewis v. Coxe*, 5 Har. 401 (Del. 1852); *Mott v. Smith*, 16 Cal. 533, at page 556 (1860); *Gillespie v. Worford*, 42 Tenn. (2 Cold.) 632 (1866); *Holland v. Moon*, 39 Ark. 120 (1882); *McCreary v. McCorkle*, 54 S. W. 53 (Tenn. Ch. App. 1899).

The reason for this rule was that the private examination of the wife was in its nature personal and therefore a matter in which she could not be represented by another. *Holladay v. Daily*, 86 U. S. (19 Wall.) 606, at page 609, 22 L. Ed. 187 (1873).

See, also, *Earle's Adm'rs v. Earle*, 20 N. J. Law, 347 (1845).

<sup>55</sup> In *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658 (1898), affirming 7 App. D. C. 116 (1895), Peckham, J., said: "When the power is given her by law to convey directly, she can by the same ceremonies authorize another to do the act for her.

in detail of the power of married women to appoint agents, depending, as it does, upon the enactments of the different states, is beyond the scope of this book.

### CAPACITY TO BE PRINCIPAL—ALIENS, CORPORATIONS, AND ASSOCIATIONS

71. Aliens, corporations, and associations are limited in their ability to be principal by all limitations restricting the ability to contract as an entity.

Aliens have generally the same power to contract, and consequently to appoint agents, that other persons have, though in some states they are by statute prohibited from acquiring or holding land.<sup>56</sup> War, however, suspends all commercial intercourse between the belligerent countries, except so far as may be allowed by the sovereign authority, and in consequence all contracts between the citizens of the belligerents which tend to increase the resources of the enemy or look to or involve any kind of trading or commercial dealing between the two countries are prohibited.<sup>57</sup> And it has been held that an alien enemy cannot appoint an agent within the United States for any purpose.<sup>58</sup> Yet war does not necessarily terminate an agency, unless it involves such prohibited intercourse.<sup>59</sup>

Within the limits of the powers conferred by its charter a corporation may appoint an agent. Indeed, a corporation,

The reasoning which would prevent it is, as we think, entirely too technical, fragile, and refined for constant use."

<sup>56</sup> Clark, Contr. (1904 Ed.) p. 146; Tiffany, Real Property (1920 Ed.) § 597.

<sup>57</sup> Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142 (1868); UNITED STATES v. GROSSMAYER, 76 U. S. (9 Wall.) 72, 19 L. Ed. 627, Powell, Cas. Agency, 126 (1869); New York Life Ins. Co. v. Davis, 95 U. S. 425, 24 L. Ed. 453 (1877); Williams v. Paine, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658 (1898).

<sup>58</sup> UNITED STATES v. GROSSMAYER, 76 U. S. (9 Wall.) 72, 19 L. Ed. 627, Powell, Cas. Agency, 126 (1869).

<sup>59</sup> See section 87, infra.

being impersonal, can act only through the intervention of agents.<sup>60</sup> Frequently, the power to appoint officers and agents is expressly conferred by charter, but the power to appoint agents is inherent in all private corporations.<sup>61</sup>

A mere unincorporated association, where not regarded as a legal entity, is incapable of appointing an agent.<sup>62</sup>

### CAPACITY TO BE AGENT—GENERAL

72. All persons, including persons incapable of contracting in their own behalf, are competent to act as agents, but as between P. and A. the validity of the contract of agency is determined by the capacity of the agent to contract.

Inasmuch as the act of an agent is in law the act of his principal, incapacity of the agent to make a binding contract on his own behalf does not debar him from making a binding contract on the part of his principal. "Monks, infants, feme coverts, persons attainted, outlawed, excommunicated, villeins, aliens, etc., may be attorneys."<sup>63</sup> So during the existence of slavery in this country it was held that "a slave, who is homo non civilis, a person who is little above a brute in legal rights, may act as the agent of his

<sup>60</sup> Ante, § 9.

See footnote 26 in chapter III as to the doctrine of constructive notice, by which all persons dealing with a corporation are charged with notice of limitations placed upon its representatives by provisions in its charter, and, in Pennsylvania, by provisions in its by-laws.

<sup>61</sup> St. Andrews Bay Land Co. v. Mitchell, 4 Fla. 192, 54 Am. Dec. 340 (1851); Protection Life Ins. Co. v. Foote, 79 Ill. 361 (1875); Hurlbut v. Marshall, 62 Wis. 590, 22 N. W. 852 (1885); Clark, Corp. (1907 Ed.) p. 469.

<sup>62</sup> Post, § 78, as to the liability of individual members of such an association on the theory that they are joint principals.

<sup>63</sup> Co. Litt. 52a. See, also, Perkins, Prof. Book, §§ 184-187. In some states it is enacted that any person may be an agent. Cal. Civil Code (1915) § 2296.

owner or hirer.”<sup>64</sup> Different considerations, of course, apply to the contract of agency entered into between principal and agent. Here the agent contracts on his own behalf, and the validity and effect of the contract depend upon his contractual capacity.

### CAPACITY TO BE AGENT—INFANTS

#### 73. An infant may act as agent.

An infant may act as agent, and his acts in that capacity are binding upon his principal.<sup>65</sup> It has been suggested that this rule is subject to the qualification that the infant must possess sufficient mental capacity for the business intrusted to him,<sup>66</sup> but unless advantage were taken of the tender years of an infant agent by the person dealing with him the principal would apparently have no ground for avoiding responsibility. So far as concerns the contract of agency, the infant may, of course, avoid it, like other contracts.<sup>67</sup>

### CAPACITY TO BE AGENT—PERSONS NON COMPOS MENTIS

#### 74. The generally announced rule is that one non compos mentis may not act as agent. This statement is too general in form.

<sup>64</sup> Chastain v. Bowman, 1 Hill, 270 (S. C. 1833); Stanley v. Nelson, 28 Ala. 514 (1856); Lyon v. Kent, 45 Ala. 656 (1871).

<sup>65</sup> WATKINS v. VINCE, 2 Stark. 368, Powell, Cas. Agency, 178 (1818); Talbot v. Bowen, 1 A. K. Marsh. 436, 10 Am. Dec. 747 (Ky. 1819); Com. v. Holmes, 119 Mass. 195 (1875). Cf. In re D'Angibau, L. R. 15 Ch. D. 228 (1880).

<sup>66</sup> Wharton, Ag. § 15; Lyon v. Kent, 45 Ala. 656 (1871).

<sup>67</sup> Vasse v. Smith, 10 U. S. (6 Cranch) 226, 3 L. Ed. 207 (1810); Whitmarsh v. Hall, 3 Denio, 375 (N. Y. 1846); Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286 (1870); Widrig v. Taggart, 51 Mich. 103, 16 N. W. 251 (1883); Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580 (1872).

It is laid down by Story "that an idiot, lunatic, or person otherwise non compos mentis cannot do any act, as an agent or attorney, binding upon the principal, for they have not any legal discretion or understanding to bestow upon the affairs of others, any more than upon their own."<sup>68</sup> Yet many simple acts of agency can be as well performed by an insane person as by one of sound mind, and it cannot be doubted that such acts of an insane agent would be binding upon the principal. And at the present day, when the contracts of the lunatic himself are voidable, and not void, and if executed cannot be avoided, if the other party was ignorant and acted in good faith and cannot be placed in *statu quo*,<sup>69</sup> it is improbable that it would be held without exception that a person non compos mentis cannot, as agent, do any act binding upon his principal. The effect of the agent's insanity upon the rights of the principal and of third persons does not appear to have come before the courts.

## CAPACITY TO BE AGENT—MARRIED WOMEN

### 75. A married woman may act as agent.

In spite of the legal fiction of the common law that husband and wife are one person, the capacity of a married woman to act, even as agent or attorney of her husband,<sup>70</sup>

<sup>68</sup> Story, Ag. § 7; Ewell's Evans, Ag. 17.

"Any one, except a lunatic, imbecile, or child of tender years, may be an agent for another." Lyon v. Kent, 45 Ala. 656 (1871), per Peters, J., dictum.

"Any person may be appointed an agent who is of sound mind." Ga. Civil Code (1910) § 3573.

But an employer may be liable for the tort of an insane workman. Central of Ga. Ry. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128 (1905).

<sup>69</sup> Ante, § 69.

<sup>70</sup> Emerson v. Blondin, 1 Esp. 142 (1794); Hopkins v. Mollinieux, 4 Wend. 465 (N. Y. 1830); Prestwick v. Marshall, 7 Bing. 565, 131 Rep. 218 (1831); Pickering v. Pickering, 6 N. H. 120 (1833); MacKinley v. McGregor, 3 Whart. 369, 31 Am. Dec. 522 (Pa. 1838);

or of a third person dealing with him,<sup>71</sup> has always been recognized. Within the scope of the authority conferred, the husband was bound by her acts and admissions. She might also be the agent of another in dealing with other persons.<sup>72</sup> Of course, no express or implied contract of agency could exist between principal and agent in any such case. How far such a contract can exist between a husband and wife, where either acts as agent of the other, under the enabling statutes of the present day, depends, of course, upon the terms and construction of the enactments of the different states.

#### CAPACITY TO BE AGENT—ADVERSE INTEREST

76. It does not seem that adverse interest should entirely destroy one's capacity to act as agent, but under the statute of frauds a party to a contract is not allowed to execute the note or memorandum required as agent for the other party thereto.

There is no inherent reason why one party to a contract may not act for the other in preparing and signing an instrument which contains its terms,<sup>73</sup> or even as attorney for the other in executing an instrument in its performance. Thus, under a mortgage containing a power of sale, which provides that the mortgagee may purchase at the sale, and that the deed to the purchaser may be made by

Felker v. Emerson, 16 Vt. 653, 42 Am. Dec. 532 (1844); Cantrell v. Colwell, 3 Head, 471 (Tenn. 1859).

<sup>71</sup> Co. Litt. 52a; Story, Ag. § 7; Fenner v. Lewis, 10 Johns. 38 (N. Y. 1813).

<sup>72</sup> Story, Ag. § 7.

"A feme covert cannot be an agent for another than her husband except by his consent, in which case he is bound by her acts." Ga. Civil Code (1910) § 3573.

<sup>73</sup> A memorandum of an agreement, not required by the statute of frauds, made by one party in a book of the other, in his presence and at his request, is evidence against him. Snyder v. Walford, 33 Minn. 175, 22 N. W. 254, 53 Am. Rep. 22 (1885).

the mortgagee as attorney of the mortgagor, it has been held that such a deed executed by the mortgagee as attorney directly to himself is valid.<sup>74</sup> Under the seventeenth section of the statute of frauds,<sup>75</sup> however, a party to a contract of sale may not, as agent of the party to be charged, execute the "note or memorandum" provided for. The statute provides for a note or memorandum to be "made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized," and this language has been construed to mean that the agent must be some third person, and not the other contracting party; for to hold otherwise would open the door to the fraud which the statute was intended to prevent.<sup>76</sup> Under the fourth section, providing that the writing shall be signed by "the party to be charged therewith, or some other person thereunto by him lawfully authorized," the same rule prevails.<sup>77</sup>

It is sometimes said that a person cannot become agent

<sup>74</sup> Hall v. Bliss, 118 Mass. 554, 19 Am. Rep. 476 (1875); Woonsocket Inst. for Savings v. Worsted Co., 13 R. I. 255 (1881). These cases could be distinguished from other agency cases on the ground that a power differs from normal authority to act for another. Cf. Clough v. Clough, 73 Me. 487, 40 Am. Rep. 386 (1882).

<sup>75</sup> 29 Car. II, c. 3, § 17.

<sup>76</sup> Wright v. Dannah, 2 Camp. 203 (1809); Farebrother v. Simmons, 5 B. & Ald. 333, 106 Rep. 1213 (1822), memorandum signed by auctioneer, suing as seller; Smith v. Arnold, 5 Mason, 414, Fed. Cas. No. 13,004 (U. S. 1829); BENT v. COBB, 75 Mass. (9 Gray) 397, 69 Am. Dec. 295, Powell, Cas. Agency, 179 (1857); Tull v. David, 45 Mo. 444, 100 Am. Dec. 385 (1870); Sharman v. Brandt, L. R. 6 Q. B. 720 (1871); Happ Bros. Co. v. Hunter, etc., Co., 145 Ga. 836, 90 S. E. 61 (1916); Asbury v. Mauney, 173 N. C. 454, 92 S. E. 267 (1917); Lezinsky Co., Inc., v. Hoffman, 111 Misc. Rep. 415, 181 N. Y. Supp. 732 (1920).

The rule does not, however, exclude the agent of the seller from acting as agent of the buyer. Durrell v. Evans, 1 H. & C. 174, 158 Rep. 848 (1862). See Benjamin, Sales (1920 Ed.) p. 312; Tiffany, Sales, 77.

<sup>77</sup> Smith v. Arnold, 5 Mason, 414, Fed. Cas. No. 13,004 (U. S. 1829); BENT v. COBB, 75 Mass. (9 Gray) 397, 69 Am. Dec. 295, Powell, Cas. Agency, 179 (1857); Browne, Stat. Frauds, § 367.

in a transaction where he has an interest or a duty which is adverse to that of his principal. Thus it is said that a person cannot act as agent in buying his own goods, and that at a sale made for his principal he cannot become the buyer.<sup>78</sup> But while an agent will not be permitted to assume a position in which his interest is antagonistic to that of his principal, and if he does so the principal may disaffirm the transaction, adverse interest does not incapacitate the agent. This subject will be discussed in treating of the duties of the agent to his principal.<sup>79</sup>

#### CAPACITY TO BE AGENT—LICENSING STATUTES

77. Statutes requiring a license as a condition precedent to the doing of a specific type of business generally must be complied with before an individual can recover compensation for acting as an agent of the designated type.

There are numerous statutes, enacted for the purpose of protecting the public in dealings with certain classes of agents, principally attorneys at law<sup>80</sup> and brokers,<sup>81</sup> which

<sup>78</sup> Story, *Ag.* § 9, and discussion in 18 *Col. Law Rev.* 282.

<sup>79</sup> See section 146, *infra*.

<sup>80</sup> Ames v. Gilman, 51 Mass. (10 Metc.) 239 (1845); Hall v. Bishop, 3 Daly, 109 (N. Y. 1869); Tedrick v. Hiner, 61 Ill. 189 (1871); Hittson v. Browne, 3 Colo. 304 (1877); McIver v. Clarke, 69 Miss. 408, 10 South. 581 (1891); Browne v. Phelps, 211 Mass. 376, 97 N. E. 762 (1912). Where attorneys in firm are all duly licensed to practice in state courts, and one only licensed to practice in federal courts, firm was allowed to recover compensation for services rendered in federal courts. Harland v. Lilienthal, 53 N. Y. 438 (1873). See, also, Brooks v. Volunteer Harbor No. 4, etc., 233 Mass. 168, 123 N. E. 511, 4 A. L. R. 1086 (1919).

<sup>81</sup> Cf. Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600 (1902).

<sup>82</sup> Cope v. Rowlands, 2 M. & W. 149, 150 Rep. 707 (1836); Johnson v. Hulings, 103 Pa. 498, 49 Am. Rep. 131 (1883); Stevenson v. Ewing,

require them to procure a license or certificate as a condition precedent to the right to engage in business. The effect of noncompliance by such persons with these statutes is to preclude them from recovering compensation from their employers for services rendered.<sup>82</sup> In Michigan, under a constitutional provision (article 2, § 12) that any person shall have the right to prosecute or defend his suit in person "or by an attorney or agent," the word "agent" was construed as synonymous with "attorney," and it was held that a party to a suit could not appear by an agent who was not licensed as attorney.<sup>83</sup>

### MULTIPLE PRINCIPALS

78. Two or more persons may become joint principals, by authorizing a third person or one of their number to act on behalf of all.

Capacity to appoint an agent must be distinguished from authority to appoint. "Capacity means power to bind oneself; authority means power to bind another. \* \* \* Capacity is usually a question of law; authority is usually a question of fact."<sup>84</sup> Two or more persons, if they are in-

87 Tenn. 46, 9 S. W. 230 (1888); Buckley v. Humason, 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 423, 36 Am. St. Rep. 637 (1892); MEYER v. WIEST, 250 Pa. 573, 95 Atl. 715, Powell, Cas. Agency, 181 (1915); Goldsmith v. Manufacturers' Liability Ins. Co., 132 Md. 283, 103 Atl. 627 (1918).

<sup>82</sup> Cases cited in footnotes 80 and 81, p. 193, supra. See Clark, Contr. (1904 Ed.) p. 263 ff.

Contra, apparently on ground that the statute is for revenue only and does not affect the rights of the parties inter se. Ober v. Stephens, 54 W. Va. 354, 46 S. E. 195 (1903); McManus v. Cash Grocery Co., 143 Ga. 623, 85 S. E. 858 (1915); Reichardt v. Hill, 236 Fed. 817, 150 C. C. A. 79 (1916); Campbell v. Thomas, 56 Okl. 779, 156 Pac. 647 (1916); Linton v. Johnson, 81 W. Va. 569, 94 S. E. 945 (1918).

<sup>83</sup> Cobb v. Judge, 43 Mich. 289, 5 N. W. 309 (1880).

<sup>84</sup> Chalmers, Sale of Goods (1922 Ed.) p. 14.

dividually capable, may appoint an agent, either one of themselves or a third person, to act for them in a transaction in which they are jointly interested, thus becoming joint principals.<sup>85</sup> The assent of all the principals to the creation of the agency is, of course, required. Authority to act, or to appoint an agent to act, on behalf of all, is not conferred upon one of several persons because of common interest or common ownership. Thus one of several joint tenants or tenants in common of land or chattels has not, as such, power to sell or to authorize the sale of anything more than his individual interest.<sup>86</sup> To authorize a sale of the whole, all must concur in the appointment of the agent or in ratification of his act.<sup>87</sup>

The rule in the case of partners, although apparently different, rests upon the same principle. By virtue of the relation existing between partners, each is virtually both principal and agent.<sup>88</sup> Each has authority, unless the authority is expressly limited, to bind the firm and its members by any act necessary for carrying on the partnership business, and this authority extends to the appointment of agents so far as proper and necessary for that purpose. The assent of all the partners to such appointment is given by implication in advance by their assent to the formation of a partnership relation. To the appointment of an agent for any purpose not within the scope of the partnership, and hence not embraced within their original assent, the concurrence of all the partners is requisite.<sup>89</sup>

<sup>85</sup> WILSON v. HENDERSON, 123 Cal. 258, 55 Pac. 986, Powell, Cas. Agency, 183 (1899).

<sup>86</sup> Richey v. Brown, 58 Mich. 435, 25 N. W. 386 (1885); Tipping v. Robbins, 64 Wis. 546, 25 N. W. 713 (1885); Sims v. Dame, 113 Ind. 127, 15 N. E. 217 (1888); Cf. Weidenhammer v. McAdams, 52 Ind. App. 98, 98 N. E. 883 (1912).

<sup>87</sup> Keay v. Fenwick, L. R. 1 C. P. D. 745 (1876).

<sup>88</sup> Pooley v. Driver, L. R. 5 Ch. D. 458 (1876). See George, Partn. 49, 212.

<sup>89</sup> Burgan v. Lyell, 2 Mich. 102, 55 Am. Dec. 53 (1851); Durgin v. Somers, 117 Mass. 55 (1875); George, Partn. 216 ff.

Voluntary unincorporated associations, the object of which is not to share profits, such as clubs, social, charitable and religious societies, and the like, are not partnerships, and consequently their members, as such, are not liable for contracts negotiated by its officers.<sup>90</sup> If the members are liable at all for acts done on behalf of the association, it must be because they directly participate in the acts,<sup>91</sup> or because they authorize or ratify them. Authority is not implied from the mere fact of association.<sup>92</sup> Authority may, however, be conferred in advance by accepting membership in an association whose constitution or articles of association expressly provide, for example, that authority to bind the members shall be vested in its officers, or that contracts may be entered into on behalf of the association when authorized by vote of a majority.<sup>93</sup> In other cases, it must be shown that the member sought to be charged has by words or conduct authorized the act or contract in question.<sup>94</sup>

There has apparently been a modification of the law as

<sup>90</sup> George, Partn. 24.

<sup>91</sup> Cross v. Williams, 7 H. & N. 675, 158 Rep. 641 (1862).

<sup>92</sup> Flemyng v. Hector, 2 M. & W. 172, 150 Rep. 716 (1836); Blakely v. Bennecke, 59 Mo. 193 (1875); ASH v. GUIE, 97 Pa. 493, 39 Am. Rep. 818; Powell, Cas. Agency, 186 (1881); Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716 (1883); Lewis v. Tilton, 64 Iowa, 220, 19 N. W. 911, 52 Am. Rep. 436 (1884); McCabe v. Goodfellow, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204 (1892); Winona Lumber Co. v. Church, 6 S. D. 498, 62 N. W. 107 (1895).

<sup>93</sup> Flemyng v. Hector, 2 M. & W. 172, 150 Rep. 716 (1836); Todd v. Emly, 8 M. & W. 505, 151 Rep. 1138 (1841); Davison v. Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40 (1887); Bennett v. Lathrop, 71 Conn. 613, 42 Atl. 634, 71 Am. St. Rep. 222 (1899).

<sup>94</sup> Ray v. Powers, 134 Mass. 22 (1883). See, also, cases cited footnote 92, p. 196, supra.

Where a college class at a class meeting voted to publish a book, the members voting or assenting to the vote were liable for the expense, at the suit of the printer under a contract with a member elected as business manager. Willcox v. Arnold, 162 Mass. 577, 39 N. E. 414 (1895). "Every member present assents beforehand to whatever the majority may do. \* \* \* If he would escape responsibility, \* \* \* he ought to protest and throw up his membership on the spot." Eich-

to voluntary associations in this regard in the case of torts committed by labor union officials in the prosecution of economic warfare. In Lawlor v. Loewe,<sup>95</sup> the court, in substance, charged the jury that, if the members paid their dues and continued to delegate authority to their officers unlawfully to interfere with plaintiff's interstate commerce, in such circumstances that they knew or ought to have known, then such members were jointly liable. So it has been held that the making of money contributions to a strike fund constitutes an adoption, by all members so contributing, of all acts theretofore done by the union officials in prosecuting the strike.<sup>96</sup>

### MULTIPLE AGENTS

79. Authority may be given to two or more persons jointly or severally. When authority of a private nature is given to two or more persons, unless the principal has manifested a different intention, the authority is presumed to be joint, and all must join in its execution. A different rule of interpretation prevails when the authority is of a public nature.

A principal may give authority to two or more agents as well as to a single agent to do an act. Where two or more agents are appointed, the intention of the principal must determine whether the authority is joint or several; that is, whether it must be exercised by all or may be exercised by one. Yet such powers of attorney and appointments of agents are construed with great strictness,<sup>97</sup>

baum v. Irons, 6 Watts & S. 67, at page 69, 40 Am. Dec. 540 (Pa. 1843), per Gibson, C. J.

Authority may be shown by acquiescence in a course of dealing from which assent is to be inferred. Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505 (1883).

<sup>95</sup> 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341 (1915).

<sup>96</sup> Jones v. Maher, 62 Misc. Rep. 388, 116 N. Y. Supp. 180, affirmed 141 App. Div. 919, 125 N. Y. Supp. 1126 (1909).

<sup>97</sup> For example, Coke lays it down that a power of attorney to

and where authority is given to two or more, unless a different intention is expressed or is clearly to be inferred, the authority is presumed to be joint.<sup>98</sup> Thus, if a power of attorney is given to A. and B. to sell or convey land, and the instrument contains nothing to indicate that one alone may act, both must join in a sale or conveyance. On the other hand, if an intention to confer a several authority is manifest, it will be given effect.<sup>99</sup> Thus, if authority is given to A. and B., or either of them, execution by both or either is good. And where power was given by the principal to fifteen "jointly and separately \* \* \* to sign and underwrite all such policies as they, his said attorneys, or any of them, should jointly and separately think proper," a policy executed by four was held binding.<sup>1</sup> For this reason, where a principal appoints a partnership as his agent, each partner may execute, since the act of one partner is the act of the firm, and it is to be assumed that the principal made the appointment in view of the rules ordinarily governing the transaction of the business of a partnership.<sup>2</sup> Story says that "in commercial transactions a more liberal interpretation in favor of trade is admitted, as thereby public confidence, as well as general convenience,

three jointly and severally, although it may be executed by all or one, may not be executed by two. Co. Litt. 181b.

<sup>98</sup> Copeland v. Insurance Co., 23 Mass. (6 Pick.) 198 (1828); Rollins v. Phelps, 5 Minn. 463 (Gil. 373) (1861); Robbins v. Horgan, 192 Mass. 443, 78 N. E. 503 (1906); UNTERBERG v. ELDER, 211 N. Y. 499, 105 N. E. 834, Ann. Cas. 1915C, 616. Powell, Cas. Agency, 191 (1914); Reeves v. Nat. Fire Ins. Co., 41 S. D. 341, 170 N. W. 575, 4 A. L. R. 1293 (1919).

"It ordinarily will be presumed [that the authority] was conferred upon all from considerations of a personal nature and in order to derive the benefit of their combined experience, discretion or ability." Grand Lodge, etc., v. Allen, 221 S. W. 675 (Tex. Civ. App. 1920).

<sup>99</sup> French v. Price, 41 Mass. (24 Pick.) 13 (1833); Hawley v. Keeler, 53 N. Y. 114 (1873).

<sup>1</sup> Guthrie v. Armstrong, 5 B. & Ald. 628, 106 Rep. 1320 (1822).

<sup>2</sup> Kennebec Co. v. Banking Co., 72 Mass. (6 Gray) 204 (1856); Deakin v. Underwood, 37 Minn. 98, 33 N. W. 318, 5 Am. St. Rep. 827 (1887).

is best consulted.”<sup>3</sup> This more liberal interpretation rests, as in other cases, upon the supposed intention of the principal, in determining which the character of the agency is a material circumstance. The rules governing the construction of authority have been considered.<sup>4</sup>

The rules which relate to the authority of directors as agents of a corporation rest upon considerations which do not apply to other private agents.<sup>5</sup>

A different rule of construction or interpretation prevails where the agency is of a public nature. This distinction was pointed out by Coke, who gave as an illustration the case of a warrant by a sheriff “to four or three jointly or severally to arrest the defendant,” two of whom might arrest him, “because it is for the execution of justice, and therefore shall be more favorably expounded than when it is only for private.”<sup>6</sup> The most frequent application of the distinction is where authority is to be exercised by persons forming a board or other body constituted by law, such as inspectors, commissioners, overseers of the poor, assessors, and the like. In these cases, unless the law otherwise provides, if all meet, the act of the majority will bind.<sup>7</sup> And, if all have been duly notified to meet, it is

<sup>3</sup> Story, *Ag.* § 44.

<sup>4</sup> *Supra*, sections 11-15.

<sup>5</sup> Directors can bind the corporation only when regularly assembled at a board meeting. Unless this meeting is a stated one, notice must be given to each director; but, if all are present, want of notice is immaterial. A majority is a quorum, and a majority of the quorum may bind the corporation. These rules apply when the charter does not provide otherwise. Clark, *Corp.* (1907 Ed.) 475 et seq. Generally speaking, a committee of a corporation is subject to the same rules. *McNeil v. Chamber of Commerce*, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559 (1891).

<sup>6</sup> *Co. Litt.* 181b. A warrant of distress addressed to two may be executed by one. *Lee v. Vessey*, 1 H. & N. 90, 156 Rep. 1130 (1856).

<sup>7</sup> *King v. Beeston*, 3 T. R. 592, 100 Rep. 750 (1789), church wardens and overseers of a parish; *Grindley v. Barker*, 1 B. & P. 229, 126 Rep. 873 (1798), triers or inspectors of leather; *Sprague v. Bailey*, 19 Pick. 436 (Mass. 1837); *Crocker v. Crane*, 21 Wend. 211, 34 Am. Dec. 228 (N. Y. 1839); *Martin v. Lemon*, 26 Conn. 192 (1857); *Soens*

generally held that an act performed by a majority who have met is valid.<sup>8</sup>

v. City of Racine, 10 Wis. 271 (1860); Cooley v. O'Connor, 79 U. S. (12 Wall.) 391, 20 L. Ed. 446 (1870).

Hurd's Rev. St. Ill. (1915-16) c. 131, § 1, subd. 9: "Words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or persons."

Fairview Fluor-Spar & Lead Co. v. American S. & T. Co., 206 Ill. App. 443 (1917).

<sup>8</sup> Damon v. Inhabitants of Granby, 2 Pick. 345 (Mass. 1824); Martin v. Lemon, 26 Conn. 192 (1857). The authorities are fully collected and discussed in First Nat. Bank v. Town of Mt. Tabor, 52 Vt. 87, 36 Am. Rep. 734 (1879). This was an action upon interest coupons attached to bonds purporting to have been issued by defendant town. Plaintiff relied upon an instrument of assent, to which was appended a certificate of two of three commissioners appointed under an act making such certificate conclusive evidence of the facts set forth. It was held that the act of two, the third sharing in the deliberations of the commissioners, but refusing to concur in their decision, was a sufficient compliance with the law. People ex rel. Nally v. Sisson, 101 Misc. Rep. 485, 168 N. Y. Supp. 476 (1917).

**CHAPTER X****DELEGATION****Delegation of Authority—**

- 80. General Rule.
- 81. When Allowed.
- 82. Legal Consequences When Unauthorized.
- 83. Legal Consequences When Authorized.

**DELEGATION OF AUTHORITY—GENERAL RULE****80. An agent normally has no power to appoint a subagent.**

The appointment of an agent is usually made because of his supposed peculiar fitness to perform the specific task intrusted to him.<sup>1</sup> Thus his appointment is the result of

<sup>1</sup> *Catlin v. Bell*, 4 Camp. 183 (1815); *Henderson v. Barnewall*, 1 Y. & J. 387, 148 Rep. 721 (1827); *Lynn v. Burgoyne*, 52 Ky. (13 B. Mon.) 400 (1852); *Appleton Bank v. McGilvray*, 70 Mass. (4 Gray) 518, 64 Am. Dec. 92 (1855); *Lewis v. Ingersoll*, 3 Abb. Dec. 55 (N. Y. 1864); *Waldman v. Insurance Co.*, 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883 (1890); *Ruthven v. Insurance Co.*, 92 Iowa, 316, 60 N. W. 663 (1894); *Fargo v. Cravens*, 9 S. D. 646, 70 N. W. 1053 (1897); *CULLINAN v. BOWKER*, 180 N. Y. 93, 72 N. E. 911, Powell, Cas. Agency, 194 (1904); *Ware v. Mosher*, 52 Colo. 318, 121 Pac. 751 (1912); *Smith v. Abbott*, 221 Mass. 326, 109 N. E. 190 (1915); *Garr, Scott & Co. v. Rogers*, 46 Okl. 67, 148 Pac. 161 (1915); *L. B. Grant Lumber Co. v. Robertson*, 84 Okl. 277, 203 Pac. 478 (1922).

Cf. *People ex rel. Cohoes Ry. Co. v. Public Serv. Com.*, 143 App. Div. 769, 128 N. Y. Supp. 384, affd. 202 N. Y. 547, 95 N. E. 1137 (1911).

"One who has a blank power or authority from another to do any act must execute it himself, and cannot delegate it to a stranger; for, this being a trust or confidence reposed in him personally, it cannot be assigned to one whose integrity or ability may not be known to the principal, and who, if he were known, might not be selected by him for such a purpose. The authority is expressly personal, unless, from the express language used, or from the fair presumptions growing out of the particular transaction, a broader power was intended to be conferred." *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319 (1858).

"If a man is to be held liable for the acts of his servants, he certainly should have the exclusive right to determine who they shall be. Hence, we think, in every well-considered case where a person

the principal's belief in this individual's skill, integrity, or other personal qualifications. Consequently an agent as such has no power to appoint a subagent.<sup>2</sup> This is the basis of the maxim "Delegata potestas non potest delegari"—delegated authority cannot be delegated. Thus, where goods are consigned to a factor, the factor has ordinarily no authority to deliver over the goods to a third person for sale, and such a disposition of the goods would be a conversion.<sup>3</sup> So, a person authorized to sell land must exercise his own judgment and discretion, and cannot delegate the performance of his agency to another.<sup>4</sup> So a person authorized to accept bills of exchange or make promissory notes must exercise his judgment as to the necessity or propriety of accepting a bill or executing a note, and, in the absence of circumstances peculiar to the particular agency, authority to delegate the performance of these duties will not be implied.<sup>5</sup> So an agency to collect and receive money, reposing in personal trust and confidence, may not be delegated without authority.<sup>6</sup>

has been liable, under the doctrine referred to (*respondeat superior*), for the negligence of another, that other was engaged either by the defendant personally or by others by his authority, express or implied." *Haluptzok v. Railway Co.*, 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739, per Mitchell, J. (1893).

<sup>2</sup> *Lyon v. Jerome*, 26 Wend. 485, 37 Am. Dec. 271 (N. Y. 1841).

<sup>3</sup> *Warner v. Martin*, 52 U. S. (11 How.) 223, 13 L. Ed. 667 (1850); *Campbell v. Reeves*, 40 Tenn. (3 Head) 226 (1859); section 1293, S. D. Revised Code (1919).

<sup>4</sup> *Carroll v. Tucker*, 2 Misc. Rep. 397, 21 N. Y. Supp. 952 (1893); *Tynan v. Dullnig*, 25 S. W. 465, 818 (Tex. Civ. App. 1894); *Doggett v. Greene*, 254 Ill. 134, 98 N. E. 219, Ann. Cas. 1913B, 1166 (1912).

<sup>5</sup> *Emerson v. Hat Co.*, 12 Mass. 237, 7 Am. Dec. 66 (1815); *Commercial Bank v. Norton*, 1 Hill. 501 (N. Y. 1841).

<sup>6</sup> *Lewis v. Ingersoll*, 3 Abb. Dec. 55 (1864); *Fellows v. Northrup*, 39 N. Y. 117 (1868).

Where the agency is broad, e. g., to take charge of and manage the business of the principal generally, power to delegate may be implied. *McConnell v. Mackin*, 22 App. Div. 537, 48 N. Y. Supp. 18 (1897).

Cf. *Smith v. Abbott*, 221 Mass. 326, 109 N. E. 190 (1915).

### DELEGATION OF AUTHORITY—WHEN ALLOWED

81. If the principal intended the agent to discharge his task through subagents, the power to delegate exists. Such intent may be gathered from the expressions of the principal, the character of the business, usages, prior conduct of the parties, the necessity of meeting an emergency, or from the character of the acts committed to the agent being ministerial only.

If, however, the principal intended to permit the agent to discharge his task through subagents, then the power to delegate exists.<sup>7</sup> This intention is perfectly clear when the authority of the agent contains an express power of substitution.<sup>8</sup> In most cases, however, the intent has to be gathered from the character of the business, the usages of trade, or the prior conduct of the parties.<sup>9</sup> Thus, if the

<sup>7</sup> See cases in footnotes 8–17, pp. 203–205, infra.

Montana Civil Code (1921) § 7971, provides:

“An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:

“1—When the act to be done is purely mechanical;

“2—When it is such that the agent cannot himself, and the subagent can lawfully perform;

“3—When it is the usage of the place to delegate such powers; or

“4—When such delegation is specially authorized by the principal.”

The same provision is embodied in section 1281, S. D. Revised Code (1919).

<sup>8</sup> Wicks v. Hatch, 62 N. Y. 535 (1875); Story, Ag. § 201.

<sup>9</sup> See sections 11 to 15, supra.

“But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for that purpose, and where that is the case the reason of the thing requires that the rule (*delegatus non potest delegare*) should be relaxed, so as on the one hand to enable the agent to appoint what has been termed a ‘sub-agent’ or ‘substitute’ (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we

business is such that it is necessary or reasonable that it should be conducted through subagents, the intent is implied.<sup>10</sup> So, if a note is deposited with a bank for collection at a distant place, authority to employ the agency of a bank at the place of payment is necessarily implied.<sup>11</sup> So, also, authority to prosecute a suit implies authority to employ an attorney to conduct it.<sup>12</sup> It has also been held that the

adopt for want of a better, and for the sake of brevity), and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority of the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute, and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself." *DE BUSSCHE v. ALT*, 8 Ch. D. 286, at page 310, Powell, Cas. Agency, 201 (1878), per Thesiger, L. J.

*Blowers v. Ry.*, 74 S. C. 221, 54 S. E. 368 (1906); *James Bradford Co. v. Edw. Hill's Sons & Co.*, 116 Atl. 353 (Del. 1922).

<sup>10</sup> *Quebec & R. R. Co. v. Quinn*, 12 Mo. P. C. 232 (1858); *Rossiter v. Trafalgar L. A. Ass'n*, 27 Beav. 377, 54 Rep. 148 (1859); *Planters' & Farmers' Nat. Bank v. Bank*, 75 N. C. 534 (1876); *DE BUSSCHE v. ALT*, 8 Ch. D. 286, at 311, Powell, Cas. Agency, 201 (1878); *National Steamship Co. v. Sheahan*, 122 N. Y. 461, 25 N. E. 858, 10 L. R. A. 782 (1890); *Fritz, Adm'x, v. Western Union Tel. Co.*, 25 Utah, 263, 71 Pac. 209 (1902); *Eastland v. Maney*, 36 Tex. Civ. App. 147, 81 S. W. 574 (1904); *Tippecanoe Loan, etc., Co. v. Jester*, 180 Ind. 357, 101 N. E. 915, L. R. A. 1915E, 721 (1913); Cf. *Bank of Ky. v. Express Co.*, 93 U. S. 174, 23 L. Ed. 872 (1876).

A stockbroker may act through a subagent, where the purchase or sale is to be made in a distant city. *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125 (1870).

<sup>11</sup> *Dorchester & Milton Bank v. Bank*, 55 Mass. (1 Cush.) 177 (1848). See, also, cases cited infra, footnotes 40 and 41, pp. 214, 215.

<sup>12</sup> *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396 (1820).

conduct of an insurance agency necessarily involves the use of subagents.<sup>13</sup>

The usage of trade will justify the delegation of authority,<sup>14</sup> provided the usage is not inconsistent with the express terms of the authority.<sup>15</sup> Thus where, by usage of trade, a factor is authorized to employ another person to dispose of the property such authority is implied.<sup>16</sup> The parties are assumed to have intended the usual method of executing the original agency. Similarly the power of delegation may be implied from the previous course of dealing or from the knowledge of the principal that an agent is in the habit of conducting his business by means of sub-agents.<sup>17</sup>

There is some authority that the power to delegate will also be implied where in the course of the agency an un-

<sup>13</sup> "We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person, and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums in cash or securities, and to give credit for premiums, or to demand cash, and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of 'delegatus non potest delegare' does not apply in such a case." *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566 (1872).

*Grady v. Insurance Co.*, 60 Mo. 116 (1875); *Arff v. Insurance Co.*, 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721 (1890).

This ability to delegate may exist as to part of an agent's function and be absent as to the remainder of his function. *CULLINAN v. BOWKER*, 180 N. Y. 93, 72 N. E. 911, Powell, Cas. Agency, 194 (1904).

<sup>14</sup> *Appleton Bank v. McGilvray et al.*, 70 Mass. (4 Gray) 518, 64 Am. Dec. 92 (1855); *Darling v. Stanwood*, 96 Mass. (14 Allen) 504 (1867); and cases in next preceding footnote.

<sup>15</sup> *Emerson v. Hat Co.*, 12 Mass. 237, 7 Am. Dec. 66 (1815).

<sup>16</sup> *Laussatt v. Lippincott*, 6 Serg. & R. 386, 9 Am. Dec. 440 (Pa. 1821).

<sup>17</sup> *Quebec & R. R. Co. v. Quinn*, 12 Mo. P. C. 232 (1858); *Loomis v. Simpson*, 13 Iowa, 532 (1862).

foreseen emergency arises which imposes upon the agent the necessity of employing a subagent.<sup>18</sup> But the limits of this doctrine are not clearly defined, and it must be applied with caution. In this country it has sometimes been held that the conductor of a train has implied authority, on the ground of necessity, in such an emergency as the sickness or absence of a brakeman, to employ another person to take his place, and that such person for the time being is the servant of the railway company.<sup>19</sup> In a recent English case,<sup>20</sup> where the driver of the defendants' omnibus, being the worse for liquor, was ordered by a police inspector to discontinue driving, it was held by the trial court that under the circumstances the conductor and driver had implied authority to authorize a volunteer to drive the omnibus home, a distance of a quarter of a mile, and that the defendants were liable for an injury caused by his careless driving to a foot passenger. In the Court of Appeal<sup>21</sup> the

<sup>18</sup> DE BUSSCHE v. ALT, 8 Ch. D. 286, Powell, Cas. Agency, 201 (1878), per Thesiger, L. J., dictum; Central Ky. Traction Co. v. Miller, 147 Ky. 110, 143 S. W. 750, 40 L. R. A. (N. S.) 1184 (1912); Story, Ag. § 201.

<sup>19</sup> Fox v. Railway Co., 86 Iowa, 368, 53 N. W. 259, 17 L. R. A. 289 (1892). Cf. Georgia Pac. Ry. Co. v. Propst, 83 Ala. 518, 3 South. 764 (1887) Id., 85 Ala. 203, 4 South. 711 (1887).

In Sloan v. Railway Co., 62 Iowa, 728, 16 N. W. 331 (1883), the regular brakeman absented himself for a week, and plaintiff took his place with the knowledge and consent of the conductor, but of no superior officer. On the sixth day of his employment plaintiff was ordered by the conductor to perform a duty, in discharging which he was injured. It was held that he could recover under a statute making railway corporations liable for damages sustained by employés in consequence of the neglect of other employés.

<sup>20</sup> Gwilliam v. Twist, [1895] 1 Q. B. 557.

<sup>21</sup> Gwilliam v. Twist, [1895] 2 Q. B. 84. Lord Esher said: "I am very much inclined to agree with the view taken by Eyre, C. J., in the case of Nicholson v. Chapman, 2 H. Bl. 254 (1793), and by Parke, B., in the case of Hawtayne v. Bourne, 7 M. & W. 595, 151 Rep. 905 (1841), to the effect that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of the master of a ship or the acceptor of a bill of exchange for honor of the drawer."

See section 22, *supra*, and section 144, *infra*.

judgment was reversed upon the ground that the evidence did not justify a finding that there was a necessity to delegate the duty of driving the omnibus. The court said that it was not necessary to decide "whether, if there were a necessity for a servant to delegate his duty to another person, that delegation would make that other person a servant of the master so as to render the latter responsible for his acts," but inclined to the opinion that the doctrine of authority by reason of necessity did not apply to such a state of facts.

Since the inability to delegate authority rests upon the supposed peculiar fitness of the agent to perform the specific task assigned him, the reason for the rule fails as to acts which are purely ministerial, and which consequently do not involve the exercise of judgment or discretion. Accordingly we find the courts holding that merely ministerial acts may be delegated in the absence of express limitation upon such delegation.<sup>22</sup> Thus an agent having authority to make contracts, accept bills of exchange, or execute promissory notes, may, after exercising his judgment as to the terms of a contract or the propriety of accepting a bill or executing a note, delegate to another the mechanical duty of reducing the contract to writing or signing the paper.<sup>23</sup> So, an agent authorized to sell land, who has examined the land and fixed the price, may avail himself

<sup>22</sup> Mason v. Joseph, 1 Smith, 406 (1804); Lord v. Hall, 8 C. B. 627, 137 Rep. 653 (1849); Eldridge v. Holway, 18 Ill. 445 (1857); Williams v. Woods, 16 Md. 220 at 247 (1860); Grinnell v. Buchanan, 1 Daly, 538 (N. Y. 1866); Grady v. Insurance Co., 60 Mo. 116 (1875); Weaver v. Carnall, 35 Ark. 198, 37 Am. Rep. 22 (1879); White, etc., Co. v. Egelhoff, 96 Ark. 105, 131 S. W. 208 (1910); Wilken v. Capital Fire Ins. Co., 99 Neb. 828, 157 N. W. 1021 (1916).

Cf. Rossiter v. Trafalgar L. Ass'n, 27 Beav. 377, 381, 54 Rep. 148 (1859).

<sup>23</sup> Ex parte Sutton, 2 Cox, 84, 30 Rep. 39 (1788); Commercial Bank v. Norton, 1 Hill, 501, (N. Y. 1841); Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280 (1857); Norwich University v. Denny, 47 Vt. 13 (1874), subscription agreement; Grady v. Insurance Co., 60 Mo. 116 (1875), insurance policy.

of the services of another to find a purchaser and conclude a sale upon the terms fixed.<sup>24</sup>

### DELEGATION OF AUTHORITY—LEGAL CONSEQUENCES WHEN UNAUTHORIZED

82. When an unauthorized delegation has been made, the legal relations of P. and T. cannot be affected by such subagent, and A. is responsible to P. for the conduct of such subagent and to the subagent for his compensation.

Thus far we have been considering to what extent there may be a power of delegation. If such power of delegation cannot be established, and the agent has nevertheless employed the instrumentality of another in executing his task, the acts of this other do not impose any obligation or liability whatever upon the principal to third persons,<sup>25</sup> nor are there any rights<sup>26</sup> or liabilities<sup>27</sup> as principal or as agent created between this subagent and the original principal. The subagent is responsible only to the agent, who is his employer, and he in turn is responsible to the principal for the acts of the subagent.<sup>28</sup>

<sup>24</sup> Renwick v. Bancroft, 56 Iowa, 527, 9 N. W. 367 (1881); McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178 (1889); Ryer v. Turkel, 75 N. J. Law, 677, 70 Atl. 68 (1902).

<sup>25</sup> Gwilliam v. Twist, [1895] 2 Q. B. 84; Winkleblack v. National Exch. Bank, 155 Mo. App. 1, 136 S. W. 712 (1911); Garr, Scott & Co. v. Rogers, 46 Okl. 67, 148 Pac. 161 (1915). See article by Mechem, 3 Mich. Law Rev. 198.

<sup>26</sup> Terre Haute, etc., Ry. Co. v. Brown, 107 Ind. 336, 8 N. E. 218 (1886); Bond v. Hurd, 31 Mont. 314, 78 Pac. 579, 3 Ann. Cas. 566 (1904); Houston Cotton, etc., Co. v. Bibby, 43 Tex. Civ. App. 100, 95 S. W. 562 (1906); Carroll v. Manganese Safe Co., 111 Md. 252, 73 Atl. 665 (1909); James Bradford Co. v. Edw. Hill's Son & Co., 116 Atl. 353 (Del. 1922).

<sup>27</sup> See cases in next preceding footnote.

<sup>28</sup> Where plaintiff intrusted to a shipmaster trading to the West Indies goods, which he undertook to sell for her there, it was not a defense, in an action for an accounting, that defendant, not being able to sell them there, had sent them elsewhere in search of a mar-

**DELEGATION OF AUTHORITY—LEGAL CONSEQUENCES WHEN AUTHORIZED**

83. Where a subagent is appointed by authority of the principal, the subagent is, so far as relates to third persons, the agent of the principal, and the acts of the subagent are binding upon the principal; but whether, as between principal and subagent, the relation of principal and agent is created, so that the subagent is responsible to the principal, depends upon whether the agent has been authorized to employ the subagent on the principal's behalf—that is, to create privity of contract between them—or has been authorized simply to employ a subagent on his own responsibility.

It does not follow, however, that because the employment of a subagent is authorized, privity of contract is

ket, where they were destroyed by an earthquake. Lord Ellenborough clearly held that, there being a special confidence reposed in the defendant, he had no right to hand them over to another, and to give them a new destination. *Catlin v. Bell*, 4 Camp. 183 (1815).

Defendants were employed by plaintiff to aid him in selling land by obtaining offers and communicating them to plaintiff, together with such information as they could readily obtain, and by consummating a sale in case of acceptance. Defendants employed O., who obtained an offer for \$22.50, but reported to defendants that he had received an offer for \$10 per acre, which defendants bona fide reported to plaintiff, advising him it was a fair price, and a sale was consummated, O. accounting to defendants, and they to plaintiff, on the basis of \$10, though O. obtained \$22.75 per acre. Held that, if O. was employed without plaintiff's express or implied consent, there being no usage or necessity therefor, no privity was created between plaintiff and O., and defendants were liable for the balance of the price received by O. *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443 (1886).

*Stephens v. Badcock*, 3 B. & Ad. 354, 110 Rep. 133 (1832); *Appleton Bank v. McGilvray*, 70 Mass. (4 Gray) 518, 64 Am. Dec. 92 (1855); *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. 32, 50 Atl. 286, 55 L. R. A. 408, 88 Am. St. Rep. 770 (1901), and comment thereon in 1 Mich. Law Rev. 140; *Thompson & Co. v. Taylor*, 124 S. W. 357 (Ky. 1910).

created between him and the principal, so that he is responsible to the principal, or that the agent is discharged from responsibility for the acts of the subagent.

Whenever the employment is authorized, the acts of the subagent are, indeed, binding upon the principal; or, in other words, the subagent is, so far as relates to third persons, the agent of the principal.<sup>29</sup> But whether, as between principal and subagent, the relation of principal and agent is created by the employment depends upon the nature of the authority conferred upon the agent. The principal may confer authority upon any terms and subject to any conditions which he sees fit to impose. He may, on the one hand, authorize the employment of a subagent on his own behalf. In such case by the employment privity of contract is created between principal and subagent, who becomes thereby the agent of and responsible to the principal, and the agent discharges his whole duty if he exercises reasonable care in the selection of the subagent, and is not responsible for his acts or defaults.<sup>30</sup> On the other hand, the principal may authorize the employment of a subagent simply on the agent's behalf; that is, at the agent's risk and upon his responsibility. In such case the principal is, of course, bound by the acts of the subagent, because he has consented to be bound by them; but no privity of contract is created between him and the subagent because he has not authorized the agent to make a contract of employment to which he (the principal) shall be a party.

<sup>29</sup> See excellent discussion of the same problem in the imposition of vicarious tort liability "Master's Liability for Stranger's Negligence," Mechem, 3 Mich. Law Rev. 198, at page 218. See, also, 8 Col. Law Rev. 589.

<sup>30</sup> Loomis v. Simpson, 13 Iowa, 532 (1862); Darling v. Stanwood, 96 Mass. (14 Allen) 504 (1867); McCants v. Wells, 4 S. C. 381 (1873); Whitlock v. Hicks, 75 Ill. 460 (1874); National Steamship Co. v Sheahan, 122 N. Y. 461, 25 N. E. 858, 10 L. R. A. 782 (1890); Morris v. Warlick, 118 Ga. 421, 45 S. E. 407 (1903).

Cf. Strong v. Stewart, 56 Tenn. (9 Heisk.) 137 (1872).

Privity of contract in such case exists only between the agent and the subagent, and the agent is responsible for the acts and defaults of the subagent, because such was the intention of the principal and the undertaking of the agent.<sup>31</sup>

The same principles apply when the authority of an agent to employ a subagent is derived from ratification. The principal may, of course, ratify the unauthorized employment of a subagent; and, if he does so with knowledge that the subagent was employed as his agent, the ratification will be equivalent to previous authority to create privity of contract between them; but if the subagent was not so employed, or if the principal ratifies without such knowledge, the ratification will be equivalent only to previous authority to employ a subagent on the agent's own responsibility, and not to create privity of contract.<sup>32</sup>

<sup>31</sup> Exchange Nat. Bank v. Bank, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722 (1884), per Blatchford, J. "The distinction between the liability of one who contracts to do a thing, and that of one who merely receives a delegation of authority to act for another, is a fundamental one. \* \* \* If the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant undercontractors or subagents, when defaults occur injurious to his interest. \* \* \* The nature of the contract is the test. If the contract be only for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used."

And see cases cited, footnote 41, p. 215, infra, for statements of this rule.

<sup>32</sup> Barnard v. Coffin, 141 Mass. 37, at page 41, 6 N. E. 364, 55 Am. Rep. 443 (1886), per Field, J. "It is argued that, as the plaintiff knew before he signed the deed that the sale was made by Ochs, the plaintiff, by confirming the sale and signing the deed, ratified the employment of Ochs. If the plaintiff understood that Ochs was employed by the defendants as his agent, then these acts of the plaintiff might be held to be a ratification of his employment, and equivalent to an authority to the defendants to employ Ochs as the

If the terms of the agency were always fully expressed, no difficulty in applying these principles would arise; but because the intention of the parties, and consequently the nature of the authority, is ordinarily matter of inference, difficult questions of fact are presented for determination.

Thus it becomes necessary to divide the cases in which power to delegate exists into two classes: (1) Those in which the agent has power to substitute another wholly or partly in the relation of agent to his principal; and (2) those in which the agent has power to use other instrumentalities in accomplishing the principal's purpose, but remains primarily charged with the attainment of that purpose. This distinction in no way affects the rights or liabilities between third persons and the principal,<sup>33</sup> but does determine the rights and liabilities of the principal, the agent and the subagent *inter sese*. In cases of the first group the principal and subagent have all the rights and liabilities of principal and agent as against each other,<sup>34</sup>

agent of the plaintiff. But if the plaintiff understood that the defendants employed Ochs as their agent to assist them in transacting the business which they had undertaken, then these acts of the plaintiff might only show that the plaintiff was willing that the defendants should transact the business by means of their servants or agents for whom they should be responsible, and it was competent for the court, on the evidence, to find that this was the understanding and intention of the plaintiff."

Lumber Co. v. Silo Co., 92 Kan. 368, 140 Pac. 867, Ann. Cas. 1915D, 30 (1914).

<sup>33</sup> See cases in footnote 25, p. 208, *supra*.

<sup>34</sup> Wilson v. Smith, 44 U. S. (3 How.) 763, 11 L. Ed. 820 (1845); Wicks v. Hatch, 62 N. Y. 535 (1875); DE BUSSCHE v. ALT, 8 Ch. D. 286, Powell, Cas. Agency, 201 (1878). See quotation from case given at footnote 9, p. 203, *supra*.

Hornbeck v. Gilmer, 110 La. 500, 34 South. 651 (1903); Wright v. Isaacks, 43 Tex. Civ. App. 223, 95 S. W. 55 (1906).

Cf. Bowstead Dig. Ag. (1919 Ed.) Art. 41.

Guelich v. Bank, 56 Iowa, 434, 9 N. W. 328, 41 Am. Rep. 110 (1881). "A subagent is accountable ordinarily only to his superior agent when employed without the assent or direction of the principal, but, if he be employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts.

while in cases of the second group no contractual relation exists between the principal and the subagent, and hence neither the rights nor liabilities of principal or agent are possessed or incurred by either.<sup>35</sup> This is frequently expressed by saying that there is no privity of contract between them. In such a case the original agent is responsible to the original principal for the act of the subagent.<sup>36</sup>

Which type of the power to delegate exists in any specific case must be determined from the facts. An express authority to substitute another in the doing of the task brings a case clearly into the first group.<sup>37</sup> So, also, the power to substitute another may be implied from the character of the business, the usages of the trade or any other factor indicating the intent of the parties.<sup>38</sup> It has been often declared that whenever authority to employ subagents is expressed or may be implied, privity of contract between principal and subagent is created by the employment,<sup>39</sup> but such statements must usually be read in the light of the facts before the court, and cannot be supported as stating a rule unless "subagent" is used with the restricted meaning of "substitute" or of "agent for the prin-

There is, in such a case, a privity between the subagent and the principal, who must, therefore, seek a remedy directly against the subagent for his negligence or misconduct."

<sup>35</sup> New Zealand & A. L. Co. v. Watson, 7 Q. B. D. 374 (1881); Kinkead v. Hartley, 161 Iowa, 618, 143 N. W. 591, Ann. Cas. 1915D, 1 (1913).

In such a case the subagent can recover his compensation from the agent. McCarthy v. Hughes, 36 R. I. 66, 88 Atl. 984, Ann. Cas. 1915D, 26 (1913); Mitchell v. Teague, 233 S. W. 1040 (Tex. Civ. App. 1921).

<sup>36</sup> Nensukhdas v. Birdichand, 19 Bombay, L. R. 948 (1917) and comment thereon, 18 Col. Law Rev. 490.

<sup>37</sup> Wicks v. Hatch, 62 N. Y. 535 (1875); Story, Ag. § 201.

<sup>38</sup> Appleton Bank v. McGilvray et al., 70 Mass. (4 Gray) 518, 64 Am. Dec. 92 (1855); Darling v. Stanwood, 96 Mass. (14 Allen) 504 (1867); McCants v. Wells, 4 S. C. 381 (1873).

<sup>39</sup> Wilson v. Smith, 44 U. S. (3 How.) 763, 11 L. Ed. 820 (1845); Campbell v. Reeves, 40 Tenn. (3 Head) 226 (1859); and see DE BUSSCHE v. ALT, 8 Ch. D. 286, at page 310, Powell, Cas. Agency, 201 (1878).

cipal." If the rule is so limited, it furnishes little practical guidance; for in doubtful cases the very question in controversy is whether the principal has authorized the employment to be made on his own behalf or on behalf of the agent. The difficulty of determining the intention of the parties is illustrated by the conflicting decisions referred to in the next paragraph.

When a bank receives from a customer for collection a bill or note payable at a distant place, the parties necessarily contemplate that the bank shall send the paper to the place where it is payable, and shall employ some subagent there to collect and receive payment. So far as the debtor is concerned, such subagent is the agent of the customer or principal, and payment to the subagent is binding upon the principal. The question remains whether privity of contract is created between principal and subagent, so that the subagent is directly responsible to the principal, and the home bank or agent is responsible only for due care in selection, or whether the subagent is agent of and responsible to the home bank, and it is responsible to the principal for the neglects and defaults of the subagent. If, as is sometimes done, the parties have expressed their intention in this regard, no difficulty arises. In the absence of any express agreement, the answer to the question depends upon the understanding to be implied from the deposit of the paper for collection, and in their interpretation of this transaction the courts have taken opposite views. By a majority of the courts in this country it is held that the home bank merely undertakes to use due care in transmitting the paper and in selecting a subagent.<sup>40</sup> By other

<sup>40</sup> *East Haddam Bank v. Scovil*, 12 Conn. 303 (1837); *Hyde v. Bank*, 17 La. 560, 36 Am. Dec. 621 (1841); *Dorchester & Milton Bank v. Bank*, 55 Mass. (1 Cushing) 177 (1848); *Citizens' Bank v. Howell*, 8 Md. 530, 63 Am. Dec. 714 (1855); *Stacy v. Bank*, 12 Wis. 629 (1860); *Bank of Louisville v. Bank*, 67 Tenn. (8 Baxt.) 101, 35 Am. Rep. 691 (1874); *Daly v. Bank*, 56 Mo. 94, 17 Am. Rep. 663 (1874); *Guelich v. Bank*, 56 Iowa, 434, 9 N. W. 328, 41 Am. Rep. 110 (1881); *Third Nat. Bank v. Bank*, 61 Miss. 112, 48 Am. Rep. 78 (1883); *Merchants' Nat.*

courts,<sup>41</sup> including the Supreme Court of the United States,<sup>42</sup> it is held that the bank undertakes to collect the paper, and thus assumes the liability of an independent contractor with responsibility for the acts and defaults of its subagents.

It is generally conceded on both sides that the decisive consideration is what was the understanding of the parties as to the duty the home bank undertakes to perform.<sup>43</sup> The nature of this understanding, it is submitted, is really a question of fact. In declaring, on the one hand, that in such cases the undertaking of the home bank is to transmit to a suitable agent for collection, or, on the other hand, that the undertaking of the home bank is to collect, the court in effect lays down a more or less arbitrary rule of construction, based, indeed, upon the understanding which the court thinks likely to prevail in such cases, to which it

Bank v. Goodman, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728 (1885); First Nat. Bank v. Sprague, 34 Neb. 318, 51 N. W. 846, 15 L. R. A. 498, 33 Am. St. Rep. 644 (1892); Irwin v. Reeves Pulley Co., 20 Ind. App. 101, 48 N. E. 601, 50 N. E. 317 (1898); Wilson v. Bank, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632 (1900); Fanset v. State Bank, 24 S. D. 248, 123 N. W. 686 (1909); Hoffman v. Mechanics', etc., Bank, 249 S. W. 168 (Mo. App. 1923); Tillman County Bank v. Behringer, 257 S. W. 206 (Tex. Sup. 1923). Numerous other cases are cited in the above.

<sup>41</sup> Allen v. Bank, 22 Wend. 215, 34 Am. Dec. 289 (N. Y. 1839), vote 14 to 10; Mackersy v. Ramsays, 9 Cl. & F. 818 (1843); Reeves v. Bank, 8 Ohio St. 465 (1858); Titus v. Bank, 35 N. J. Law, 588 (1871); Ayrault v. Bank, 47 N. Y. 570, 7 Am. Rep. 489 (1872); Simpson v. Waldby, 63 Mich. 439, 30 N. W. 199 (1886); Power v. Bank, 6 Mont. 251, 12 Pac. 597 (1887); Streissguth v. Bank, 43 Minn. 50, 44 N. W. 797, 7 L. R. A. 363, 19 Am. St. Rep. 213 (1890); State Nat. Bank v. Manufacturing Co., 17 Tex. Civ. App. 214, 42 S. W. 1016 (1897); Smith v. National Bank of D. O. Mills & Co., 191 Fed. 226 (U. S. C. C. Cal. 1911); Cf. Commercial Bank v. Bank, 8 N. D. 382, 79 N. W. 859 (1899). Numerous other cases are cited in the above.

<sup>42</sup> Exchange Nat. Bank v. Bank, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722 (1884).

<sup>43</sup> "The foundation for all the differences of opinion among the learned judges \* \* \* appears clearly to rest in the interpretation of the implied contract between the depositor and the bank at the time the negotiable paper is deposited for collection." Power v. Bank, 6 Mont. 251, 12 Pac. 597 (1887), per McLeary, J.

resorts because the parties either have no intention on the point or have failed to express it. In view of the diversity of opinion among judges as to the understanding between parties to such a transaction, it is probable that an equal diversity of understanding exists among the parties themselves, and it would be difficult to say that one rule is better calculated to give effect to their intentions than the other. If, as intimated in *Exchange National Bank v. Third National Bank*,<sup>44</sup> the question is to be determined "according to those principles which will best promote the welfare of the commercial community," it would seem that the rule adopted in that case, which does not compel the customer to resort for a remedy to a distant and unknown agent, is to be preferred. It has been suggested, however, that the majority doctrine is justified by the fact that under it the whole matter is settled in one suit.<sup>45</sup>

The same conflict of authority exists in respect to the responsibility of the bank for the acts and defaults of a notary employed by it to protest paper which it has received for collection.<sup>46</sup>

A similar question is presented when a claim is placed in the hands of an attorney for collection. If the debtor resides at a distant place, the attorney necessarily has au-

<sup>44</sup> 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722 (1884), per Blatchford, J.

<sup>45</sup> 14 Harv. Law Rev. 384.

<sup>46</sup> That the bank is responsible only for due care in selecting the notary *Bellemire v. Bank*, 4 Whart. 105, 33 Am. Dec. 46 (Pa. 1839); *Baldwin v. Bank*, 1 La. Ann. 13, 45 Am. Dec. 72 (1846); *Warren Bank v. Bank*, 64 Mass. (10 Cush.) 582 (1852); *Stacy v. Bank*, 12 Wis. 629 (1860).

To the same effect, but on the ground that the notary is a public officer whose duties are prescribed by statute. *Britton v. Nicolls*, 104 U. S. 757, 26 L. Ed. 917 (1881), distinguished in *Exchange Nat. Bank v. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722 (1884); *First Nat. Bank v. Butler*, 41 Ohio St. 519, 52 Am. Rep. 94 (1885).

That the bank is responsible for the acts and defaults of the notary. *Ayrault v. Bank*, 47 N. Y. 570, 7 Am. Rep. 489 (1872); *Davey v. Jones*, 42 N. J. Law, 28, 36 Am. Rep. 505 (1880); *Bank of Lindsborg v. Ober*, 31 Kan. 599, 3 Pac. 324 (1884).

thority to employ an attorney or agent at that place, and whether the latter is agent of the first attorney or of the principal is a question of fact, depending upon the understanding of the original parties.<sup>47</sup> Many cases turn upon the construction of receipts, stating in terms that the claim is received "for collection," and such receipts have generally been construed as importing an undertaking to collect, and not merely to transmit to a suitable agent to collect.<sup>48</sup> The same construction has been placed upon the undertaking of collection and commercial agencies in respect to claims received for collection.<sup>49</sup> The receipt may, of course, contain terms requiring a different construction.<sup>50</sup>

<sup>47</sup> *National Bank of the Republic v. Bank*, 112 Fed. 726, 50 C. C. A. 443 (1902).

<sup>48</sup> *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 665 (1872), citing cases; *Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264 (1880).

<sup>49</sup> *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 665 (1872); *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274 (1885); *Dale v. Hepburn*, 11 Misc. Rep. 286, 32 N. Y. Supp. 269 (1895); *McCarthy v. Hughes*, 36 R. I. 66, 88 Atl. 984, Ann. Cas. 1915D, 26 (1913).

<sup>50</sup> *Sanger v. Dun*, 47 Wis. 615, 3 N. W. 388, 32 Am. Rep. 789 (1879).

A mercantile agency, which contracts with its subscribers to communicate on request information as to the responsibility of merchants throughout the United States, stipulating that the information is to be obtained mainly by subagents of the subscribers, whose names are not to be disclosed, and that the correctness of information is not guaranteed, is not liable for loss occasioned to a subscriber by the willful and fraudulent act of a subagent in furnishing false information. *Dun v. Bank*, 58 Fed. 174, 7 C. C. A. 152, 23 L. R. A. 687 (1893).

## CHAPTER XI

### TERMINATION

84. Significance of Termination.
85. Termination by Natural Expiration.
86. Termination by Withdrawal of Either P. or A.
87. Termination by Disability of Either P. or A.
88. Nonterminable Authority.
89. Authority Coupled with an Obligation.

### SIGNIFICANCE OF TERMINATION

84. The rights of the principal, the agent, and third persons alter substantially upon the termination of the relation.

The difference between the authority and the power of an agent has been discussed.<sup>1</sup> This distinction is important in cases dealing with the termination of the relation, because the relation may be effectually terminated as between P. and A. and still continue in full force and effect as between P. and third persons.<sup>2</sup> When A.'s authority is ended, he cannot claim compensation as agent for services thereafter rendered,<sup>3</sup> and he is henceforth free to deal with the subject-matter of his former agency for his own profit.<sup>4</sup> When A.'s power is ended, third persons can no longer gain rights against his principal through A.'s acts.<sup>5</sup> If the termination of A.'s agency violated the terms of the contract between P. and A., the aggrieved party is entitled to damages against the other.<sup>6</sup> Thus many changes of legal con-

<sup>1</sup> See section 16, *supra*.

<sup>2</sup> See cases in footnotes 34-36, pp. 223, 224, *infra*.

<sup>3</sup> See section 151, *infra*.

<sup>4</sup> *Walker v. Derby*, 5 Biss. 134, Fed. Cas. No. 17,068 (1870); *Short v. Millard*, 68 Ill. 292 (1873); *Moore v. Stone*, 40 Iowa, 259 (1875).

<sup>5</sup> *Taylor v. Lendey*, 9 East, 49, 103 Rep. 492 (1807); *Blackburn v. Scholes*, 2 Camp. 341, at page 343 (1810).

<sup>6</sup> See section 152, *infra*.

sequences attend upon the termination of the relation, and it becomes necessary to discover what constitutes such termination.

The relation of principal and agent may end by natural expiration,<sup>7</sup> by the express withdrawal of either party from the relation,<sup>8</sup> or by the disability of either party to the relation.<sup>9</sup>

### TERMINATION BY NATURAL EXPIRATION

85. The creation of the relation necessarily involves either an express or implicit provision for its ending by expiration.

In the creation of every agency there is present, either expressly or by implication, a provision for its termination. Sometimes the agreement of P. with A. is for a definite period of time, or for the accomplishment of a particular end, or until the happening of a certain event. In such a case, the lapse of the prescribed period,<sup>10</sup> the attainment of the desired end,<sup>11</sup> or the occurrence of the described event,<sup>12</sup> automatically ends the relationship. These events

<sup>7</sup> See section 85, infra.

<sup>8</sup> See section 86, infra.

<sup>9</sup> See section 87, infra.

<sup>10</sup> Gundlach v. Fischer, 59 Ill. 172 (1871).

<sup>11</sup> Blackburn v. Scholes, 2 Camp. 341, at page 343 (1810); Walker v. Derby, 5 Biss. 134, Fed. Cas. No. 17,068 (1870); Hartford v. McGillicuddy, 103 Me. 224, 68 Atl. 860, 16 L. R. A. (N. S.) 431, 12 Ann. Cas. 1083 (1907); Sweeney v. Brow, 35 R. I. 227, 86 Atl. 115, Ann. Cas. 1915C, 1075 (1913).

An agent employed to let or sell a house, after having let, had not authority to sell, and was not entitled to commission on sale. GILLOW v. ABERDARE, 9 T. L. R. 12, Powell, Cas. Agency, 212 (1892). Accord: Marquam v. Ray, 65 Or. 41, 131 Pac. 523 (1913).

After completion of the transaction, a declaration of the agent is not binding on the principal.

Atlanta Sav. Bank v. Spencer, 107 Ga. 629, 33 S. E. 878 (1899). Cf. Merchants' Bank v. Acme Lumber & M. C., 170 Ala. 443, 54 South. 58 (1911).

<sup>12</sup> Danby v. Coutts, L. R. 29 Ch. D. 500 (1885); Bennett Lumber Co. v. Walnut, etc., Co., 105 Ark. 421, 151 S. W. 275 (1912); Mitch-

terminate the relation, because they have been intended by P. and A. to have that result. If there be no express indication of the parties' intent as to the duration of the relation, they will be assumed to have intended that the relation continue for a reasonable time in view of all the circumstances.<sup>13</sup> The courts seek to decide questions as to the termination of the relation according to the manifested intent of the parties.<sup>14</sup> Thus it has been held to be an implied term of the appointment, unless a contrary intention is manifested, that the authority shall cease in the event of the principal himself performing the act or causing it to be performed by another.<sup>15</sup> In such a case, the authority is determined by implied limitation, but notice of revocation to A. is necessary to stop A.'s power to act for P.<sup>16</sup> Some courts have improperly held that no notice to T. was necessary in such a case.<sup>17</sup> It has also been held

*ell v. Musical M. P. Union*, 168 N. Y. Supp. 22 (Sup. 1917); *Castner, etc., Inc., v. Sudduth Coal Co.*, 282 Fed. 602 (C. C. A. 1922).

<sup>13</sup> *Marquam v. Ray*, 65 Or. 41, 131 Pac. 523 (1913); *Milwee v. Waddleton*, 233 Fed. 989, 147 C. C. A. 663 (1916); *Robertson v. Wilson*, 121 Wash. 358, 209 Pac. 841 (1923); *Harris v. McPherson*, 97 Conn. 164, 115 Atl. 723, 24 A. L. R. 1530 (1922). Cf. *Hartford v. McGillicuddy*, 103 Me. 224, 68 Atl. 860, 16 L. R. A. (N. S.) 431, 12 Ann. Cas. 1083 (1907). Cf. *Boehm v. Spreckels*, 183 Cal. 239, 191 Pac. 5 (1920).

<sup>14</sup> Thus parties will be assumed to have contracted under a general usage that broker's authority expires with the day on which he is employed. *Dickinson v. Liltwall*, 4 Camp. 279 (1815); *Union S. S. Mach. Co. v. Lockwood*, 110 Ill. App. 387 (1903); *Staroske v. Publishing Co.*, 235 Mo. 67, 138 S. W. 36 (1911).

<sup>15</sup> *Benoit v. Inhabitants of Conway*, 92 Mass. (10 Allen) 528 (1865); *Gilbert v. Holmes*, 64 Ill. 548 (1871); *Frazier v. Cox*, 125 S. W. 148 (Ky. 1910); *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684 (1919).

Article 1735, Philippine Civil Code, "The appointment of a new agent for the same business produces a revocation of the previous agency from the day on which notice was given to the former agent excepting the provisions of the next preceding article."

Cf. *Hutson v. Stone*, 119 S. C. 259, 112 S. E. 39 (1922).

<sup>16</sup> *Staats v. Mangelsen*, 105 Neb. 282, 180 N. W. 78 (1920).

<sup>17</sup> *Ahern v. Baker*, 34 Minn. 98, 24 N. W. 341 (1885); *Kelly v. Brennan*, 55 N. J. Eq. 423, 37 Atl. 137 (1897).

See *Jones v. Hodgkins*, 61 Me. 480 (1872), where P. authorized

to be an implied term of the appointment that the subject-matter of the agency shall continue in existence.<sup>18</sup> Thus, where P. authorized an agent to sell a ship, which was later lost, the agent's authority and power were both thereby ended.<sup>19</sup> In all of the cases thus far considered, the agency relation has terminated by the arrival of the end contemplated and intended by the parties at the time of its creation.

#### TERMINATION BY WITHDRAWAL OF EITHER P. OR A.

86. Except in cases covered by sections 88 and 89, the relation can always be ended by revocation or renunciation, subject to an action for breach of contract if such breach has occurred.

Prior to the arrival of such end, however, the relationship can normally be terminated by the withdrawal of either party. If P. withdraws, we have a revocation.<sup>20</sup> If

A. to sell, and then later sold to X. A. had possession of the chattels, and thereafter sold and delivered them to T. Held, X. could not recover in trover against T., as T. should be protected as to acts done by A. within his apparent authority.

<sup>18</sup> Story, Ag. § 499; Tiffany, Sales, 23, 160; Mecham, Sales, § 199.

<sup>19</sup> Clearly, unless a contrary intention is manifested, a condition is to be implied that the authority shall continue only so long as the ship continues to exist. Quære, whether the principal could not confer authority in such terms that he would be bound by a contract of sale made on his behalf, notwithstanding that, when it was entered into, the ship had ceased to exist. A contract for the sale of a thing, which unknown to the parties, has ceased to exist, is void for mutual mistake; but if the seller knew the fact, and the buyer did not, the seller would be bound. The question of the termination of the authority by extinction of the subject-matter is distinct from the question of the discharge of a contract of employment by subsequent impossibility; but in both cases the result depends upon whether the parties must have contemplated the continued existence of the subject-matter as a condition—that is, whether such a condition is to be implied. See *Turner v. Goldsmith*, [1891] 1 Q. B. 544.

<sup>20</sup> *Blackstone v. Buttermore*, 53 Pa. 266 (1867); *Chambers v. Seay*,

A. withdraws, it is called a renunciation.<sup>21</sup> Thus the authority of an auctioneer may be revoked at any time before the goods are knocked down to a purchaser.<sup>22</sup> And if a broker is authorized to buy or sell, the authority may be revoked at any time before completion of a contract of purchase or of sale, and if under the statute of frauds a writing is required, even after a verbal contract has been completed.<sup>23</sup> The principal can revoke the authority, although he has agreed to employ the agent for a longer time, and by revoking is guilty of a breach of the contract of employment; for the power is distinct from the right to revoke.<sup>24</sup> The revocation must be communicated to A.,<sup>25</sup> but this notice may be either express<sup>26</sup> or implied from any conduct of P., known to A., which manifests an intention

73 Ala. 372 (1882); *Rees v. Pellow*, 97 Fed. 167, 38 C. C. A. 94 (1899); *Smith v. Dare*, 89 Md. 47, 42 Atl. 909 (1899); *Mosnat v. Berkheimer*, 158 Iowa, 177, 139 N. W. 469 (1913); *FLINDERS v. HUNTER*, 60 Utah, 314, 208 Pac. 526, Powell, Cas. Agency, 213 (1922).

<sup>21</sup> See cases in footnotes 49 and 50, p. 228, *infra*.

<sup>22</sup> *Manser v. Back*, 6 Hare, 443, 67 Rep. 1239 (1848).

A recent English case holds, however, that after land has been bid off the purchaser cannot revoke the auctioneer's authority to sign the memorandum. *VAN PRAAGH v. EVERIDGE*, [1902] 2 Ch. 266, Powell, Cas. Agency, 55 and comment thereon in 3 Col. Law Rev. 56.

Cf. *Bowdoin v. Headley*, 98 South. 32 (Ala. 1923).

<sup>23</sup> *Farmer v. Robinson*, 2 Camp. 339, note (1805).

<sup>24</sup> See cases in footnote 2, p. 237, *infra*, and also section 152, *infra*.

<sup>25</sup> *Weile v. U. S.*, 7 Ct. Cl. 535 (1871); *Jones v. Hodgkins*, 61 Me. 480 (1872); *Spinks v. Georgia*, etc., Co., 114 La. 1044, 38 South. 824 (1905); *Best v. Gunther*, 125 Wis. 518, 104 N. W. 82, 918, 1 L. R. A. (N. S.) 577, 110 Am. St. Rep. 851 (1905), and note thereon in 19 Harv. Law Rev. 373.

Cf. *Donnan v. Adams*, 30 Tex. Civ. App. 615, 71 S. W. 580 (1902), and comments thereon in 3 Col. Law Rev. 279, and in 1 Mich. Law Rev. 670.

Thus a letter of revocation takes effect as between P. and A. from the time of its receipt, and not from the time of mailing. *Robertson v. Cloud*, 47 Miss. 208 (1872).

<sup>26</sup> *Brookshire v. Brookshire*, 30 N. C. 74, 47 Am. Dec. 341 (1847); *Rees v. Pellow*, 97 Fed. 167, 38 C. C. A. 94 (1899), letter delivered at agent's office in his absence.

to revoke.<sup>27</sup> Thus authority conferred by a sealed instrument may be revoked by parol.<sup>28</sup> The appointment of another agent to do the same act may be effective as a revocation of the power of the former agent,<sup>29</sup> although no such implication would arise, unless the exercise of the authority by both were incompatible.<sup>30</sup> So, if the principal disposes of the subject-matter of the agency, as, for example, if he sells property which he has authorized another to sell, a revocation is to be implied.<sup>31</sup> So a revocation of authority is to be implied from the dissolution of a partnership,<sup>32</sup> or from the severance of a joint interest.<sup>33</sup> When the intent of P. to revoke has been manifested to A., then A.'s authority ends; but A.'s power to bind P. to third persons may not end. If the principal by his conduct has held A. out as his agent, then third persons dealing thereafter with A. without knowledge of the revocation are protected, and P. is held bound.<sup>34</sup> Of course, P.'s representa-

<sup>27</sup> Copeland v. Insurance Co., 23 Mass. (6 Pick.) 198 (1828); Kelly v. Brennan, 55 N. J. Eq. 423, 37 Atl. 137 (1897), demand for return of written power and surrender thereof; Chenault v. Quisenberry, 57 S. W. 234 (Ky. 1900), power to convey revoked by conveyance of premises to agent as trustee.

<sup>28</sup> Brookshire v. Brookshire, 30 N. C. 74, 47 Am. Dec. 341 (1847); JACKSONVILLE TER. CO. v. SMITH, 67 Fla. 10, 64 South. 354, 51 L. R. A. (N. S.) 1121, Powell, Cas. Agency, 217 (1914).

<sup>29</sup> Copeland v. Insurance Co., 23 Mass. (6 Pick.) 198 (1828).

<sup>30</sup> Davol v. Quimby, 93 Mass. (11 Allen) 208 (1865); Hatch v. Coddington, 95 U. S. 48, 24 L. Ed. 339 (1877).

<sup>31</sup> In Jones v. Hodgkins, 61 Me. 480 (1872), where a commission merchant sold and delivered goods intrusted to him for sale before notice of a sale to another buyer by the principal, the purchaser from the agent was not liable to the purchaser from the principal in trover. "Undoubtedly," said Appleton, C. J., "a sale of property in the hands of a commission merchant employed to sell such property is a revocation—is an act revoking the authority given. But so long as it remains unknown to the commission merchant, he is not bound by it." See footnotes 15, 16, 17, p. 220, supra. Accord: Reams v. Wilson, 147 N. C. 304, 60 S. E. 1124 (1908).

<sup>32</sup> Schlater v. Winpenny, 75 Pa. 321 (1874).

<sup>33</sup> Rowe v. Rand, 111 Ind. 206, 12 N. E. 377 (1887).

<sup>34</sup> Trueman v. Loder, 11 Ad. & E. 589, 113 Rep. 539 (1840); Lamotte v. Dock Co., 17 Mo. 204 (1852); Tier v. Lampson, 35 Vt. 179,

tion as to A.'s authority must have been broad enough to include A.'s act with T.<sup>35</sup> and must have been reasonably relied upon by T.<sup>36</sup> Thus, where T. had knowledge of facts which gave him reasonable cause to believe the authority of A. had been withdrawn, he cannot hold P.<sup>37</sup>

As has been pointed out, the principal can revoke the authority at any time, although he has agreed to employ the agent for a longer time, and by revoking is guilty of a breach of the contract of employment. It is in this sense

82 Am. Dec. 634 (1862); *Pole v. Leask*, 33 L. J. Ch. 155 (1863); *Fellows v. Steamboat Co.*, 38 Conn. 197 (1871); *McNeilly v. Insurance Co.*, 66 N. Y. 23 (1876); *Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339 (1877); *Southern Life Ins. Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653 (1877); *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808 (1888); *Gratz v. Improvement Co.*, 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393 (1897); *Burch v. American Grocery Co.*, 125 Ga. 153, 53 S. E. 1008 (1906); *Kilpatrick v. Wiley*, 197 Mo. 123, 95 S. W. 213 (1906); *Union Bank & Trust Co. v. Lumber Co.*, 70 W. Va. 558, 74 S. E. 674, 41 L. R. A. (N. S.) 663 (1912); *Parker v. Advance Thresher Co.*, 75 Wash. 505, 135 Pac. 229 (1913); *Morgan v. Harper*, 236 S. W. 71 (Tex. Com. App. 1922). Contra: *McCallum v. Grier*, 86 S. C. 162, 68 S. E. 466, 138 Am. St. Rep. 1037 (1910).

Cal. Civil Code (1915) §§ 2355, 2356:

2355. An agency is terminated as to every person having notice thereof, by:

1. The expiration of its term;
2. The extinction of its subject;
3. The death of the agent;
4. His renunciation of the agency; or,
5. The incapacity of the agent to act as such.

2356. Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by:

1. Its revocation by the principal;
2. His death; or,
3. His incapacity to contract.

Identical provisions are found in Rev. Code S. D. (1919) §§ 1284, 1285; Civ. Code N. D. (1913) §§ 6365, 6366.

<sup>35</sup> *Watts v. Kavanagh*, 35 Vt. 34 (1861).

<sup>36</sup> *Williams v. Birbeck, Hoff. Ch. 360* (N. Y. 1840); *Clafin v. Lenheim*, 66 N. Y. 301 (1876); *Burch v. American Grocery Co.*, 125 Ga. 153, 53 S. E. 1008 (1906).

<sup>37</sup> *Mosnat v. Berkheimer*, 158 Iowa, 177, 139 N. W. 469 (1913).

that it is sometimes said that the power to revoke is distinct from the right to revoke. In other words, while the power to revoke always exists, except in certain exceptional cases,<sup>38</sup> the principal may bind himself by contract not to exercise the power, and thus incur liability toward the agent in case of revocation, as for the breach of any other contract.<sup>39</sup>

A right on the part of the agent to be employed, or a right on the part of the principal to receive the services of the agent, can arise only by virtue of a contract of employment conferring such rights. A promise on the part of the principal to employ the agent for a certain time may be express or implied, but no such promise is to be implied from the mere appointment.<sup>40</sup> Ordinarily the obligation to serve and the obligation to employ are correlative, and where the agent has bound himself to serve for a fixed term a corresponding obligation to employ will readily be implied;<sup>41</sup> but the parties may contract upon their own terms, and unless the terms are explicit the question turns upon the construction and interpretation of the particular contract.<sup>42</sup>

<sup>38</sup> Post, sections 88 and 89. Cf. *Kerr S. S. Co. v. Kerr Nav. Co.*, 113 Misc. Rep. 56, 184 N. Y. Supp. 646 (1920).

<sup>39</sup> *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491, 8 L. R. A. 410 (1890); *Green v. Cole*, 127 Mo. 587, 30 S. W. 135 (1895); *Kilpatrick v. Wiley*, 197 Mo. 123 at 167, 95 S. W. 213 (1906); *CLOE v. ROGERS*, 31 Okl. 255, 121 Pac. 201, 38 L. R. A. (N. S.) 366; *Powell, Cas. Agency*, 219 (1912); *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 99 N. E. 221 (1912); *Barnett v. Caldwell Furniture Co.*, 277 Ill. 286, 115 N. E. 389 (1917); *Broder v. Trans-Atlantic Novelty Co.*, 98 Misc. Rep. 199, 162 N. Y. Supp. 896 (1917); *Harris v. McPherson*, 97 Conn. 164, 115 Atl. 723, 24 A. L. R. 1530 (1922).

<sup>40</sup> *Kirk v. Hartman*, 63 Pa. 97 (1870); *Jacobs v. Warfield*, 23 La. Ann. 395 (1871).

<sup>41</sup> *Horn v. Association*, 22 Minn. 233 (1875); *Lewis v. Insurance Co.*, 61 Mo. 534 (1876); *Moran v. Standard Oil Co.*, 211 N. Y. 187, 105 N. E. 217 (1914).

<sup>42</sup> A. and B. agreed, "in consideration of the services and payments to be mutually rendered," that for seven years, or so long as A. should continue to carry on business at L., A. should be sole

A definite term of employment is often to be implied from the fact that the compensation of the agent is measured by the term of service. Thus, if the agent is to be paid an annual salary, the contract will readily be interpreted as contemplating an employment for a year;<sup>43</sup> and where an agent employed for a definite term, as a year or a month, continues to be employed after the expiration of the original term, a renewal of the employment for another equivalent term will, in the absence of anything to indi-

agent at L. for sale of B.'s coals. B. was to have control over prices and credits, and if A. could not sell a certain amount per year, or B. could not supply a certain amount, either might, on notice, put an end to the agreement. At the end of four years B. sold the colliery. Held, that A. could not maintain an action for breach of the agreement, since it did not bind B. to keep the colliery, or to do more than employ A. as agent for sale of such coals as he sent to L. Rhodes v. Forwood, L. R. 1 App. Cas. 256 (1876).

Defendant, a shirt manufacturer, agreed to employ plaintiff, and plaintiff agreed to serve defendant as agent, canvasser, and traveler, the agency to be determinable by either at the end of five years, by notice, and plaintiff to do his utmost to obtain orders and to sell the goods "manufactured or sold" by defendant as should be forwarded or submitted by sample to plaintiff. After two years defendant's factory was burned down, and he did not resume business or further employ plaintiff. Held, that plaintiff could recover for breach of contract, since there was (distinguishing the case from Rhodes v. Forwood, *supra*) an express promise to employ, and a condition that the factory should continue to exist could not be implied. "The contract," said Lindley, L. J., "will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done. Here the parties cannot be taken to have contemplated the continuance of the defendant's manufactory as the foundation of what was to be done; for \* \* \* the plaintiff's employment was not confined to articles manufactured by the defendant." Turner v. Goldsmith, [1891] 1 Q. B. 544. See, also, Moore v. Security Trust & L. Ins. Co., 168 Fed. 496, 93 C. C. A. 652 (1909); *Id.*, 219 U. S. 583, 31 Sup. Ct. 469, 55 L. Ed. 346 (1910).

<sup>43</sup> Emmens v. Elderton, 13 C. B. 495, 138 Rep. 1292 (1853); Horn v. Association, 22 Minn. 233 (1875); Norton v. Cowell, 65 Md. 359, 4 Atl. 408, 57 Am. Rep. 331 (1886). Contra: Orr v. Ward, 73 Ill. 318 (1874).

cate a different intention, be presumed.<sup>44</sup> But no inflexible rule can be laid down, since the intention of the parties must be gathered from the construction of the contract as a whole.<sup>45</sup>

Frequently the contract of employment, although for a definite term, provides for its prior termination upon certain contingencies, and in such cases the principal, if he discharges the agent, merely exercises a right and incurs no liability for breach of contract.<sup>46</sup> The principal may also discharge the agent without liability for breach of any implied condition in the contract of employment. As we shall see,<sup>47</sup> every agent, by entering into the relation, assumes certain obligations toward his principal, such as the obligations to obey instructions, and to use reasonable skill, diligence, and care, and to act in good faith, and in every contract of agency it is an implied condition that the agent will perform these obligations. Consequently for a breach of any of these implied conditions the principal may revoke the authority of the agent without incurring liability on that account.<sup>48</sup>

<sup>44</sup> *Tatterson v. Manufacturing Co.*, 106 Mass. 56 (1870); *Alba v. Moriarty*, 36 La. Ann. 680 (1884); *Sines v. Superintendents*, 58 Mich. 503, 25 N. W. 485 (1885).

<sup>45</sup> *Tatterson v. Manufacturing Co.*, 106 Mass. 56 (1870); *Haney v. Caldwell*, 35 Ark. 156 (1879); *McCULLOUGH IRON CO. v. CARPENTER*, 67 Md. 554, 11 Atl. 176, Powell, Cas. Agency, 223 (1887).

<sup>46</sup> *Adriance v. Rutherford*, 57 Mich. 170, 23 N. W. 718 (1885); *Oregon & W. Mortg. Sav. Bank v. Mortgage Co.*, 35 Fed. 22 (C. C. 1888); *Drake v. White Sewing Machine Co.*, 133 App. Div. 446, 118 N. Y. Supp. 178 (1909), affirmed 199 N. Y. 595, 93 N. E. 1120 (1909).

Thus where an employee agrees to be employed so long as the work is done to the satisfaction of the employer, a discharge involves an exercise of discretion not subject to review. *Brown v. Retsof Min. Co.*, 127 App. Div. 368, 111 N. Y. Supp. 594 (1908); *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N. W. 457 (1912); *Fried v. Singer*, 242 Mass. 527, 136 N. E. 609 (1922); *Contra: Highland Buggy Co. v. Parker*, 27 Ohio Cir. Ct. R. 115 (1905).

<sup>47</sup> Post, chapter XV.

<sup>48</sup> *Edwards v. Levy*, 2 F. & F. 94 (1860); *Ford v. Danks*, 16 La. Ann. 119 (1861); *Dieringer v. Meyer*, 42 Wis. 311, 24 Am. Rep. 415 (1877); *Phoenix Mut. Life Ins. Co. v. Holloway*, 51 Conn. 311, 50 Am.

Since the relation depends upon the will of both parties, it may be determined at any time by the renunciation of the agent,<sup>49</sup> subject, as in the case of revocation, to the right of the other party to recover damages for breach of the contract of employment, if such contract and breach exist.<sup>50</sup> The intention to renounce must, of course, be communicated to the principal; but it may be implied from the conduct of the agent, as when he abandons the business of the agency, and the principal may then treat the agency as terminated.<sup>51</sup> If the principal has held out the agent as such, he must, at his peril, notify third persons of the termination of the authority.<sup>52</sup> The principal is entitled to reasonable notice of renunciation; and although the agent has not bound himself by contract to serve for a definite time, or to complete the business delegated to him, it seems that he will be liable to the principal for any loss that may result from his failure to give reasonable notice.<sup>53</sup> If the renunciation is not in breach of his contract, the agent will be entitled to compensation and reimbursement as in other cases, and to recover damages if the renunciation followed a breach of the contract by the principal.<sup>54</sup> His

Rep. 21 (1883); *Walker v. John Hancock Ins. Co.*, 80 N. J. Law, 342, 79 Atl. 354, 35 L. R. A. (N. S.) 153, Ann. Cas. 1912A, 526 (1911); *Bilz v. Powell*, 50 Colo. 482, 117 Pac. 344, 38 L. R. A. (N. S.) 847 (1911); *Champion Spark Plug Co. v. Auto Sundries Co.*, 273 Fed. 74 (C. C. A. 1921). As to the implied obligations of servant, *Wood, Mast. & S.* (2d Ed.) § 83. See, also, *Id.* §§ 110-120.

<sup>49</sup> *Barrows v. Cushway*, 37 Mich. 481 (1877). On breach of a contract of agency by the principal, the agent is justified in repudiating the agency. *Duffield v. Michaels*, 97 Fed. 825 (C. C. 1899).

<sup>50</sup> *WHITE v. SMITH*, 6 Lans. 5, Powell, Cas. Agency, 227 (N. Y. 1871); *Cannon Coal Co. v. Taggart*, 1 Colo. App. 60, 27 Pac. 238 (1891); *Security Trust & L. Ins. Co. v. Ellsworth*, 129 Wis. 349, 109 N. W. 125 (1906).

<sup>51</sup> *Ford v. Danks*, 16 La. Ann. 119 (1861); *Stoddart v. Key*, 62 How. Prac. 137 (N. Y. 1881); *Osika v. Hudson Coal Co.*, 274 Pa. 367, 118 Atl. 311 (1922). Cf. *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93 (1878).

<sup>52</sup> *Capen v. Insurance Co.*, 25 N. J. Law, 67, 64 Am. Dec. 412 (1855).

<sup>53</sup> *Story, Ag.* § 478.

<sup>54</sup> *Kennedy v. Meilicke Calculator Co.*, 90 Wash. 238, 155 Pac. 1043

right to compensation where his renunciation is in breach of contract will be considered later.<sup>55</sup>

Since the relation of principal and agent may be terminated by either party, it may, of course, be terminated by agreement.

#### TERMINATION BY DISABILITY OF EITHER P. OR A.

87. Except in cases covered by sections 88 and 89, the relation is ended by the death, insanity, coverture, or bankruptcy of either P. or A., or by war between the countries of P. and A., to the extent that such disability has rendered either P. or A. less able to effectually contract.

Circumstances may occur, after the creation of an agency, which terminate it, irrespective of its original limitation or of the act of the parties directed to that end. An agency is terminated by the death, insanity, marriage, which takes away contractual capacity, or bankruptcy of one or the other of the parties, by war, or by a change of law rendering the continuance of the agency unlawful. In these cases the agency may be said to be dissolved, for lack of better term, "by operation of law."<sup>56</sup> Some of these forms of termination—for example, termination by death or bankruptcy of the agent—might perhaps be classed logically under the head of termination by original limitation; but the above classification has been adopted for the sake of convenience.

The authority of the agent, unless it be coupled with an

(1916); Standard Fashion Co. v. Thomas, 96 Vt. 319, 119 Atl. 417 (1923).

<sup>55</sup> See section 154, *infra*.

<sup>56</sup> Under dissolution by operation of law, Story includes all forms of dissolution, except by revocation or renunciation. Story, *Ag.* § 462.

interest,<sup>57</sup> is terminated by the death of the principal.<sup>58</sup> This results logically from the representative character of the agent; the authority to act necessarily presupposing a principal to be bound. The authority is also terminated by the death of one of two or more joint principals,<sup>59</sup> or by the death of a partner in case of an agent appointed by a firm.<sup>60</sup> Moreover, the contract of employment, likewise, if one exists, is terminated, and neither party is entitled to recover damages sustained during the balance of the term.<sup>61</sup> The authority terminates from the moment of death, and all subsequent acts of the agent are nullities, although the death was unknown to him and to the third

<sup>57</sup> Post, § 88.

<sup>58</sup> See California Stat. in footnote 34, p. 223. *Wallace v. Cook*, 5 Esp. 117 (1804); *Blades v. Free*, 9 B. & C. 167, 109 Rep. 63 (1829); *Watson v. King*, 4 Camp. 272 (1815); *Harper v. Little*, 2 Greenl. 14, 11 Am. Dec. 25 (Me. 1822); *Hunt v. Rousmanier*, 21 U. S. (8 Wheat.) 174, 5 L. Ed. 589 (1823); *Davis v. Bank*, 46 Vt. 728 (1874); *CLAYTON v. MERRITT*, 52 Miss. 353, Powell, Cas. Agency, 229 (1876); *Darr v. Darr*, 59 Iowa, 81, 12 N. W. 765 (1882); *In re Kern's Estate*, 178 Pa. 373, 35 Atl. 231 (1896); *Green v. Tuttle*, 5 Ariz. 179, 48 Pac. 1009 (1897); *Pacific Bank v. Hannah*, 90 Fed. 72, 32 C. C. A. 522 (1898); *Brown v. Cushman*, 173 Mass. 368, 53 N. E. 860 (1899); *Duckworth v. Orr*, 126 N. C. 674, 36 S. E. 150 (1900); *Brown v. Skotland*, 12 N. D. 445, 97 N. W. 543 (1903); *Trubey v. Pease*, 240 Ill. 513, 88 N. E. 1005, 16 Ann. Cas. 370 (1909); *Streit v. Wilkerson*, 186 Ala. 88, 65 South. 164, Ann. Cas. 1917E, 378 (1914); *Mitchell v. Weaver*, 242 Mass. 331, 136 N. E. 166 (1922). See 12 Harv. Law Rev. 563.

<sup>59</sup> Cf. *Tasker v. Shepherd*, 6 H. & N. 575, 158 Rep. 237 (1861); *Long v. Thayer*, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167 (1893). Even though instrument provides to the contrary. *Weaver v. Richards*, 144 Mich. 395, 108 N. W. 382, 6 L. R. A. (N. S.) 855 (1906).

But a power of attorney, signed by husband and wife, authorizing another to sell land which was the separate property of the wife, is not terminated by the death of the husband. *Skirvin v. O'Brien*, 43 Tex. Civ. App. 1, 95 S. W. 696 (1906). Cf. *Watkins v. Hagerty*, 104 Neb. 414, 177 N. W. 654 (1920).

<sup>60</sup> *Griggs v. Swift*, 82 Ga. 392, 9 S. E. 1062, 5 L. R. A. 405, 14 Am. St. Rep. 176 (1889). But see *Bank of New York v. Vanderhorst*, 32 N. Y. 553 (1865).

<sup>61</sup> *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578 (1863); *Kimmell v. Powers*, 19 Okl. 339, 91 Pac. 687 (1907). See *Tasker v. Shepherd*, 6 H. & N. 575, 158 Rep. 237 (1861), and *Baxter v. Burfield*, 2 Strange, 1266, 93 Rep. 1172 (1747).

persons dealing with him.<sup>62</sup> "In the case of a revocation the power continues good against the constituent, till notice is given to the attorney, but the instant the constituent dies the estate belongs to his heirs, or devisees, or creditors, and their rights cannot be divested or impaired by any act performed by the attorney after the death has happened; the attorney then being a stranger to them, and having no control over their property."<sup>63</sup> Owing to the harshness of this rule, it has not become established without some dissent.<sup>64</sup> Story was of the opinion that it should not apply where the act to be done may lawfully be done in the sole name of the agent, as in the case of a factor, supercargo, or shipmaster, and that the authority should in those cases be binding upon all the parties in interest.<sup>65</sup>

<sup>62</sup> Jenkins v. Atkins, 20 Tenn. (1 Humph.) 294, 34 Am. Dec. 648 (1839); Lewis v. Kerr, 17 Iowa, 73 (1864); Weber v. Bridgman, 113 N. Y. 600, 21 N. E. 985 (1889); Farmers' Loan & Trust Co. v. Wilson, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696 (1893); Lalor v. Tooker, 130 App. Div. 11, 114 N. Y. Supp. 403 (1909); Dallam v. Sanchez, 56 Fla. 779, 47 South. 871 (1909); Bulkley v. Northern Trust Co., 210 Ill. App. 363 (1918); Goetzman v. Danitz, 116 Misc. Rep. 140, 189 N. Y. Supp. 788 (1921). Cf. Long v. Thayer, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167 (1893). And see cases cited in footnote 58, p. 230, supra.

<sup>63</sup> Per Mellen, C. J., in Harper v. Little, 2 Greenl. 14, 11 Am. Dec. 25 (Me. 1822).

<sup>64</sup> Cassiday v. McKenzie, 4 Watts & S. 282, 39 Am. Dec. 76 (Pa. 1842), apparently not now law in Pennsylvania (see Pennsylvania case in footnote 58, p. 230, supra); Dick v. Page, 17 Mo. 234, 57 Am. Dec. 267 (1852); Ish v. Crane, 8 Ohio St. 520 (1858) Id., 13 Ohio St. 574 (1862). This case contains the most complete argument in favor of the civil-law rule, which permitted an agent's authority to continue after the death of P. Deweese v. Muff, 57 Neb. 17, 77 N. W. 361, 42 L. R. A. 789, 73 Am. St. Rep. 488 (1898); Meinhardt v. Newman, 71 Neb. 532, 99 N. W. 261 (1904); Story, Ag. §§ 495-498; Wharton, Ag. §§ 102-104.

Where a bank paid a check drawn by a depositor, but without knowledge of his death and in due course of business, the administrator of depositor cannot recover from the bank the amount so paid, although the check was not presented to or paid by the bank until after the death of the depositor. Glennan v. Rochester Trust & S. D. Co., 209 N. Y. 12, 102 N. E. 537, 52 L. R. A. (N. S.) 302, Ann. Cas. 1915A, 441 (1913).

<sup>65</sup> Story, Ag. § 496.

But this exception has not generally prevailed, and the rule is almost universally recognized that, except where the authority is coupled with an interest, the death of the principal works an instantaneous termination of the agency, and consequently that any subsequent act of the agent is inoperative to bind the principal's estate.

The agency is also terminated by the death of the agent.<sup>66</sup> The authority is personal to him, and does not vest in his executors or administrators, unless, indeed, the authority is conferred upon them by the terms of the appointment. If, however, the authority is coupled with an interest, it survives.<sup>67</sup> The death of one of two or more joint agents,<sup>68</sup> or of a member of an agent firm,<sup>69</sup> unless by the terms of the appointment authority is conferred upon the survivors, also terminates the agency. The death of an agent terminates the authority of a subagent.<sup>70</sup> unless the agent was authorized to employ the subagent on the principal's behalf, and thus create privity of contract.<sup>71</sup>

Where such a change occurs that the principal can no longer act for himself, the agent whom he has appointed can no longer act for him. Hence, if the principal becomes insane, the authority of the agent is thereby ter-

<sup>66</sup> *Gage v. Allison*, 1 Brev. 495, 2 Am. Dec. 682 (S. C. 1805); *Johnson v. Johnson's Adm'rs*, Wright, 594 (Ohio, 1834); *In re Merrick's Estate*, 8 Watts & S. 402 (Pa. 1845); *Ryder v. Johnson*, 153 Ala. 482, 45 South. 181 (1907); *Tyson v. George's C. C. & I. Co.*, 115 Md. 564, 81 Atl. 41 (1911). See, also, *Adriance v. Rutherford*, 57 Mich. 170, 23 N. W. 718 (1885).

<sup>67</sup> *Collins v. Hopkins*, 7 Iowa, 463 (1859); *Harnickell v. Orndorff*, 35 Md. 341 (1872). Power of sale passes to administrator of mortgagee. *Merrin v. Lewis*, 90 Ill. 505 (1878); *Jones, Mtg.* § 1786.

<sup>68</sup> *HARTFORD FIRE INS. CO. v. WILCOX*, 57 Ill. 180, *Powell, Cas. Agency*, 14 (1870); *Salisbury v. Brisbane*, 61 N. Y. 617 (1874); *Holbert v. Keller*, 161 Iowa, 723, at page 742, 142 N. W. 962 (1913).

<sup>69</sup> *Martine v. Insurance Co.*, 53 N. Y. 339, 13 Am. Rep. 529 (1873).

<sup>70</sup> *Peries v. Aycinena*, 3 Watts & S. 64 (Pa. 1841); *Watt v. Watt*, 2 Barb. Ch. 371 (N. Y. 1847); *Lehigh Coal & Navigation Co. v. Mohr*, 83 Pa. 228, 24 Am. Rep. 161 (1877).

<sup>71</sup> *Smith v. White*, 35 Ky. (5 Dana) 376 (1837); *Story, Ag.* § 490.

minated.<sup>72</sup> This rule is subject to the usual exception, if the authority is coupled with an interest.<sup>73</sup> And, as has been shown, if the principal has, by word or conduct, represented that an agent is authorized to act in his behalf, he is bound, notwithstanding his subsequent insanity, by an executed contract which a third person, in ignorance of the insanity and in reliance upon the representation, has entered into with the agent.<sup>74</sup> In most jurisdictions the contracts of a person who has been judicially declared insane are void, and in such case the adjudication would doubtless be constructive notice of the termination of authority.<sup>75</sup>

It is laid down by all text-writers that the insanity of the agent terminates his authority,<sup>76</sup> but the question does not

<sup>72</sup> *Davis v. Lane*, 10 N. H. 156 (1839); *Bunce v. Gallagher*, 5 Blatchf. 481, Fed. Cas. No. 2,133 (1867); *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536 (1876); *Drew v. Nunn*, 4 Q. B. D. 661 (1879); *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150 (1881); *Renfro v. City of Waco*, 33 S. W. 766 (Tex. Civ. App. 1896).

Cf. *Joost v. Racher*, 148 Ill. App. 548 (1909).

Contra: *Wallis v. Manhattan Co.*, 2 N. Y. Super. Ct. 532 (1829), holding such termination does not occur until lunacy has been established by inquisition.

<sup>73</sup> *Davis v. Lane*, 10 N. H. 156 (1839); *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Eq. 536 (1876); *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150 (1881).

<sup>74</sup> See section 69, *supra*, and also *Merritt v. Merritt*, 43 App. Div. 68, 59 N. Y. Supp. 357 (1899), and comment thereon in 13 Harv. Law Rev. 303; *Watkins v. Hagerty*, 104 Neb. 414, 177 N. W. 654 (1920).

Cf., where T. dealt with agent appointed by undisclosed P., who became insane in course of A.'s actions, *Powell v. Batchelor*, 192 Mo. App. 67, 179 S. W. 751 (1915).

<sup>75</sup> See section 69, *supra*.

In *Motley v. Head*, 43 Vt. 633 (1871), it was held that the mere appointment of a guardian would not warrant a holding that the agency was terminated, unless it appeared that the insanity was such as to disqualify from making a valid contract.

<sup>76</sup> "The case of insanity of the agent would seem to constitute a natural, nay, a necessary, revocation of his authority; for the principal cannot be presumed to intend that acts done for him, and to bind him, shall be done by one who is incompetent to understand, or to transact, the business which he is employed to execute. The exercise of sound judgment and discretion would seem to be re-

appear to have been presented to the courts. It seems that third persons dealing with the agent in good faith, and in reliance upon his apparent authority, if they could not be restored to their former position, would be entitled to protection.<sup>77</sup>

At common law the marriage of a feme sole operated to revoke the authority of an agent previously appointed by her.<sup>78</sup> Under the modern statutes conferring upon married women the power of disposing of their property, a married woman may appoint an agent,<sup>79</sup> and hence the marriage of a feme sole does not as a rule revoke the authority of her agent.<sup>80</sup> But where the joinder of the husband is necessary to a conveyance by a married woman, the power of a feme sole is necessarily revoked by marriage.<sup>81</sup> Where, by marriage, a husband or wife acquired an interest in the other's land, which can be divested only by joining in a conveyance, a power to sell land executed by a single man or woman is necessarily revoked by marriage to the extent of such interest.<sup>82</sup>

The bankruptcy of the principal terminates the authority of the agent so far as relates to rights of property of which the principal is divested by the bankruptcy,<sup>83</sup> although as

quired in all such cases, as preliminaries to the due execution of the authority." Story, Ag. § 487.

<sup>77</sup> See section 74, *supra*.

<sup>78</sup> *McCan v. O'Ferrall*, 8 Cl. & F. 30, 8 Rep. 12 (1841); *Judson v. Sierra*, 22 Tex. 365 (1858); *Wambole v. Foote*, 2 Dak. 1, 2 N. W. 239 (1878). *Gilmer's Heirs v. Veatch*, 56 Tex. Civ. App. 511, 121 S. W. 545 (1909).

<sup>79</sup> Cf. *Charnley v. Winstanley*, 5 East, 266, 102 Rep. 1072 (1804).

<sup>80</sup> Contra: *Eneu v. Clark*, 2 Pa. 234, 44 Am. Dec. 191 (1845).

<sup>81</sup> See section 70, *supra*.

<sup>82</sup> *Reynolds v. Rowley*, 2 La. Ann. 890 (1847).

<sup>83</sup> See section 70, *supra*.

<sup>82</sup> *Henderson v. Ford*, 46 Tex. 627 (1877). Case only gives to wife her homestead rights. *Joseph v. Fisher*, 122 Ind. 399, 23 N. E. 856 (1889).

<sup>83</sup> *Minett v. Forrester*, 4 Taunt. 541, 128 Rep. 441 (1811); *Wilson v. Harris*, 21 Mont. 374, at page 422, 54 Pac. 46 (1898), assignment

to other rights the authority is not affected,<sup>84</sup> nor is the authority revoked if it be part of a security or coupled with an interest.<sup>85</sup> The revocation dates from the act of bankruptcy, provided an adjudication of bankruptcy follows, but the doctrine of relation is not allowed to defeat the rights of an intervening bona fide purchaser, who has no notice of the act of bankruptcy.<sup>86</sup>

The bankruptcy of the agent terminates his authority to receive money and do acts of a like nature,<sup>87</sup> but not to do merely formal acts.<sup>88</sup> Termination by bankruptcy of the agent appears to be a result of the implied intention of the principal, rather than a necessary consequence of his bankruptcy.

As has already been stated, war terminates all commercial intercourse between the belligerent countries, and hence a citizen of one country cannot appoint an agent in the other.<sup>89</sup> For the same reason war as a rule terminates an agency if the principal is a citizen of one country and the agent a citizen of the other.<sup>90</sup> A recognized exception to the rule is an agency for collection of debts, where the agent resides in the same country with the debtor. Such an agency is not necessarily and as matter of law terminated, yet in order to subsist it must have the assent of both parties, and the assent of the principal is not to be presumed, unless perhaps it is his manifest interest that the

for benefit of creditors; *Elwell v. Coon*, 46 Atl. 580 (N. J. Ch. 1900), assignment; *Story, Ag.* § 482.

<sup>84</sup> *Dixon v. Ewart*, 3 Meriv. 322, 36 Rep. 123 (1817).

<sup>85</sup> *Dixon v. Ewart*, 3 Meriv. 322, 36 Rep. 123 (1817); *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476 (1875). See sections 88 and 89, *infra*.

<sup>86</sup> *Ex parte Snowball*, L. R. 7 Ch. App. 534, at page 548 (1872).

<sup>87</sup> *Audenried v. Betteley*, 90 Mass. (8 Allen) 302 (1864); *Sanitary Mfg. Co. v. Gamer*, 201 S. W. 1068 (Tex. Civ. App. 1918).

<sup>88</sup> *Story, Ag.* § 486.

<sup>89</sup> See section 71, *supra*.

<sup>90</sup> *Howell v. Gordon*, 40 Ga. 302 (1869); *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207 (1868); *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789 (1876); *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453 (1877).

agency should continue, in which case it will be presumed unless the contrary be shown, but otherwise assent to the continuance or ratification of the agent's act must be proved. Furthermore, no payment is good or capable of ratification if made with a view of transmitting the funds to the principal during the continuance of the war.<sup>91</sup> The exception is not strictly confined to agencies for the collection of debts, but extends to other agencies, the execution of which does not involve commercial intercourse between citizens of the belligerents. Thus, in a case in the Supreme Court of the United States it was held that a power of attorney executed by a married woman and her husband, authorizing her brother to sell and convey real estate owned by her in the city of Washington, was not revoked by the Civil War, although her husband became an officer of the Confederate army, and he and she remained within the Confederate lines during the war.<sup>92</sup>

Thus, as between P. and A., the existence of the disa-

<sup>91</sup> New York Life Ins. Co. v. Davis, 95 U. S. 425, 24 L. Ed. 453 (1877), and cases cited in footnote 90, p. 235, supra.

<sup>92</sup> Williams v. Paine, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658 (1897). "It is not every agency," said Peckham, J., "that is necessarily revoked by the breaking out of a war. \* \* \* Certain kinds of agencies are undoubtedly revoked. \* \* \* Agents of an insurance company, it is said, would come within that rule. New York Life Ins. Co. v. Davis, 95 U. S. 425, 24 L. Ed. 453 (1877). \* \* \* Agents of a life insurance company are undoubtedly engaged in the active business of their principal. Their duty is to receive the premiums for all policies obtained by them, and to transmit such premiums to the home office. \* \* \* It is easy to see that active and continuous business of such a nature could not be carried on during a war, where the principal and agent reside in the different countries engaged in such war. \* \* \* Under the circumstances of this case we think the attorney in fact had the right to make the conveyance he did. It was not an agency of the class such as was mentioned in New York Life Ins. Co. v. Davis. \* \* \* The mere fact of the breaking out of a war does not necessarily and as matter of law revoke every agency. Whether it is revoked or not depends upon the circumstances surrounding the case and the nature and character of the agency."

Accord: Tingley v. Muller, [1917] 2 Ch. 144, and note thereon in 31 Harv. Law Rev. 637.

bility ends the relationship, and generally it also ends A.'s power to bind P. to T.<sup>93</sup> No objective contract or estoppel can arise if the agency has been terminated by death,<sup>94</sup> or where it has been terminated by the marriage<sup>95</sup> or bankruptcy<sup>96</sup> of the principal, to the prejudice of the intervening rights of other persons, or where the exercise of the apparent authority would be illegal, as in case of war.<sup>97</sup> But liability to T. has been imposed on P. notwithstanding the insanity of the principal,<sup>98</sup> and, apparently, notwithstanding the insanity<sup>99</sup> or bankruptcy<sup>1</sup> of the agent.

### NONTERMINABLE AUTHORITY

88. Authority coupled with an interest is absolutely nonterminable, except by natural expiration. Authority given for a valuable consideration to secure or effect some benefit to some third person or to the grantee thereof, independent of the agent's compensation, is nonterminable, except by the death of the principal or by natural expiration.

In all of the cases thus far considered the authority and power of the agent have been revocable at the pleasure of the principal. In some cases the principal has subjected himself to an action for damages in favor of the agent by making the revocation, but he nevertheless had the ability to successfully stop any further exercise of the authority which had been delegated.<sup>2</sup> There are, however, cases in

<sup>93</sup> See cases referred to under footnotes 57-92, pp. 230-236, *infra*.

<sup>94</sup> See cases in footnotes 57-71, pp. 230-232, *supra*.

<sup>95</sup> See cases in footnotes 78-82, p. 234, *supra*.

<sup>96</sup> Except as to the rights of intervening bona fide purchasers before the adjudication. See cases in footnotes 83-86, pp. 234, 235, *supra*.

<sup>97</sup> See cases in footnotes 89-92, pp. 235, 236, *supra*.

<sup>98</sup> See cases in footnotes 74, 75, p. 233, *supra*.

<sup>99</sup> See cases in footnotes 76, 77, pp. 233, 234, *supra*.

<sup>1</sup> See cases in footnote 87, p. 235, *supra*.

<sup>2</sup> *McMahan v. Burns*, 216 Pa. 448, 65 Atl. 806 (1907); *McKellop v. Dewitz*, 42 Okl. 220, 140 Pac. 1161, 52 L. R. A. (N. S.) 255 (1914).

which the authority is really irrevocable; that is, where the principal cannot take away from the agent the authority which has been delegated even by the payment of damages. These cases are the only ones where the authority is truly irrevocable. Among these we shall find that some are entirely nonterminable, while others are nonterminable except by the death of the principal.

If an authority is conferred upon a person, on sufficient consideration, for the purpose of securing or effecting some benefit to him, independent of his compensation as agent, such an authority is nonterminable by the principal. The authority, however, does not survive the death of the principal, unless it is vested in one in whom is also vested such an interest or estate in the thing which is the subject of the authority that it can be exercised in his own name; in other words, unless the authority is, as the term is employed in the United States, "coupled with an interest." In England, while the rule in respect to irrevocable authorities appears to be substantially the same as in the United States, the term "coupled with an interest" is employed in a different sense, and is applied to any authority in the execution of which the person invested with it has such an interest or right as to make it irrevocable.<sup>3</sup> It is perhaps owing to the different meaning which is attached to the term "authority coupled with an interest" by different courts that there is some confusion in the cases in respect to the nature of the right or interest which renders an authority irrevocable.

It must be always borne in mind that, to make the authority nonterminable by the principal, the benefit sought to be secured or effected must be something more than the mere advantage or profit which the agent as such will derive from the continuance of the authority. The profit that will accrue to the agent by way of compensation for his

<sup>3</sup> *Terwilliger v. Railroad Co.*, 149 N. Y. 86, at page 94, 43 N. E. 432 (1896).

services, even if he is to receive a share of the proceeds, as of a sale or collection to be made by him, is not sufficient.<sup>4</sup> Nor, unless the interest is otherwise sufficient, is an authority irrevocable because it is a term of the contract of employment that it shall be irrevocable.<sup>5</sup> In such cases the law deems that the agent is sufficiently protected by his right of action for breach of the contract.

The leading case on the subject of nonterminable authority in the United States is *Hunt v. Rousmanier*.<sup>6</sup> In that case Hunt loaned money to Rousmanier, who executed his notes for the amount, and a day or two thereafter executed a power of attorney authorizing Hunt to execute a bill of sale of Rousmanier's interest in a certain vessel to himself or any other person, and to collect any insurance money that might become due in the event of the vessel being lost. The instrument also recited that the power was given for collateral security for payment of the

<sup>4</sup> *Hartley's Appeal*, 53 Pa. 212, 91 Am. Dec. 207 (1866); *Gilbert v. Holmes*, 64 Ill. 548 (1871); *Chambers v. Seay*, 73 Ala. 372 (1882); *Simpson v. Carson*, 11 Or. 361, 8 Pac. 325 (1884); *Darrow v. St. George*, 8 Colo. 592, 9 Pac. 791 (1885); *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820 (1886); *Oregon & W. Mortg. Sav. Bank v. Mortgage Co.*, 35 Fed. 22 (C. C. 1888); *Ballard v. Insurance Co.*, 119 N. C. 187, 25 S. E. 956 (1896); *Hall v. Gambrill*, 88 Fed. 709 (C. C. 1898); *Wilmington v. Bryan*, 141 N. C. 666, 54 S. E. 543 (1906); *Martin & Son v. Lamkin*, 188 Ill. App. 431 (1914); *JACKSONVILLE TERMINAL CO. v. SMITH*, 67 Fla. 10, 64 South. 354, *Powell, Cas. Agency*, 217 (1914).

So held, although agent's share was considerably more than half of sum to be received. *McMahan v. Burns*, 216 Pa. 448, 65 Atl. 806 (1907).

<sup>5</sup> *Walker v. Denison*, 86 Ill. 142 (1877); *Campbell v. Tunnicliff*, 185 App. Div. 506, 173 N. Y. Supp. 242 (1918); *Roth v. Moeller*, 185 Cal. 415, 197 Pac. 62 (1921).

In California by statute irrevocability is restricted to cases where A. has an interest in subject of agency. See *Flanagan v. Brown*, 70 Cal. 254, 11 Pac. 706 (1886), and also Cal. Civil Code (1915) § 2356.

"In order to make an agreement for irrevocability, contained in a power to transact business for the benefit of the principal, binding on him, there must be a consideration for it, independent of the compensation to be rendered for the services to be performed." *Blackstone v. Buttermore*, 53 Pa. 266 (1866).

<sup>6</sup> 21 U. S. (8 Wheat.) 174, 5 L. Ed. 589 (1823).

notes, and was to be void on their payment, but that in case of nonpayment Hunt was to pay the notes out of the proceeds, and return the residue. It was held that the power, since it contained no words of conveyance or assignment, was not coupled with an interest, and hence that, although it would have been irrevocable by Rousmanier, it expired on his death.

"It becomes necessary," said Marshall, C. J., "to inquire what is meant by the expression 'a power coupled with an interest.' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it."

While holding that the power in question terminated with the death of the constituent, because it was not coupled with an interest, Chief Justice Marshall was of the opinion that the power could not have been revoked by any act of the principal during his life, drawing a distinction between a power "coupled with an interest" and a power given as security, but without conveyance or assignment of any interest. "Where a letter of attorney forms part of a contract, and is a security for money, or for the performance of any act which is deemed valuable," he said, "it is generally made irrevocable in terms, or, if not so, is deemed

irrevocable in law.<sup>7</sup> Although a letter of attorney depends, from its nature, on the will of a person making it, and may, in general, be recalled at his will, yet, if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney." The basis of the distinction between a mere authority given as a security, which terminates with the life of the principal, and a power coupled with an interest, which does not so terminate, he found in the doctrine that an authority must be executed in the name of the person who gives it, from which results the legal impossibility of the exercise of the authority after the death of the person in whose name it must be exercised—a result which does not follow if the interest or title in the thing which is the subject of the agency passes with the power, and is vested in the person by whom it is to be exercised, so that in exercising it he acts in his own name. "The power given by the principal is, under such circumstances," says Story, "rather an assent or agreement that the agent may transfer the property vested in him, free from any equities of the principal, than strictly a power to transfer."<sup>8</sup>

The definition of an "authority coupled with an interest" given by Chief Justice Marshall in *Hunt v. Rousmanier*, and the distinction drawn by him between a power coupled with an interest and a mere power given as a security, have generally, if not universally, been approved in this country. Accordingly it is declared that, in order to constitute "an authority coupled with an interest," the agent must have more than a mere interest by way of security in the exercise of the authority; that he must have an interest in the thing which is the subject of the authority, and not a mere interest in that which is produced by its

<sup>7</sup> Compare statutory change embodied in statutes of California, North Dakota, and South Dakota. See footnote 34, p. 223, *supra*.

<sup>8</sup> Story, *Ag.* § 489.

exercise.<sup>9</sup> Furthermore, this "interest" must be created by the person who grants the power; thus the granting of authority by one joint owner of land to another co-owner thereof is not irrevocable.<sup>10</sup> And it is held, on the one hand, that an authority given upon sufficient consideration, for the purpose of securing to or conferring upon the agent some benefit, independent of his compensation, as where an agent is authorized to sell real or personal property,<sup>11</sup> or to collect a claim,<sup>12</sup> and apply the proceeds to the payment of a debt, is irrevocable by the act of the principal, and, on the other hand, that, unless the authority is "coupled with an interest," as above defined, the authority terminates upon the death of the principal,<sup>13</sup> but that, if it is coupled with an interest, it survives.<sup>14</sup>

<sup>9</sup> Missouri ex rel. Walker v. Walker, 125 U. S. 339, 8 Sup. Ct. 929, 31 L. Ed. 769 (1888); Stier v. Insurance Co., 58 Fed. 843 (C. C. 1893); Taylor v. Burns, 8 Ariz. 463, 76 Pac. 623, affirmed 203 U. S. 120, 27 Sup. Ct. 40, 51 L. Ed. 116 (1906); Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 N. Y. Supp. 1045 (1905); McKellop v. Dewitz, 42 Okl. 220, 140 Pac. 1161, 52 L. R. A. (N. S.) 255 (1914). And see cases cited in footnotes 4 and 5, p. 239, *supra*.

<sup>10</sup> Gilmer's Heirs v. Veatch, 56 Tex. Civ. App. 511, 121 S. W. 545 (1909). Cf. Mulloney v. Black, 244 Mass. 391, 138 N. E. 584 (1923).

<sup>11</sup> Gaußen v. Morton, 10 B. & C. 731, 109 Rep. 622 (1830), held irrevocable by P. in his life; Denson v. Thurmond, 11 Ark. 586 (1851); Terwilliger v. Railroad Co., 149 N. Y. 86, 43 N. E. 432 (1896), forebore to retake lumber in consideration of power to sell and apply. Contra: Mansfield v. Mansfield, 6 Conn. 559, 16 Am. Dec. 76 (1827).

A power to enter upon and sell and convey land, plus an assignment of all the interest of the grantor, given for a consideration of \$5, held irrevocable. Montague v. McCarroll, 15 Utah, 318, 49 Pac. 418 (1897).

<sup>12</sup> Marziou v. Piche, 8 Cal. 522 (1857); Hutchins v. Hebbard, 34 N. Y. 27 (1865); Miller, Receiver, v. Home Ins. Co., 71 N. J. Law, 175, 58 Atl. 98 (1904); Shepard v. McNail, 122 Mo. App. 418, 99 S. W. 494 (1907); Citizens' State Bank v. Tessman & Co., 121 Minn. 34, 140 N. W. 178, 45 L. R. A. (N. S.) 606 (1913).

<sup>13</sup> Huston's Adm'r v. Cantril, 38 Va. (11 Leigh) 136 (1840); Hough-taling v. Marvin, 7 Barb. 412 (N. Y. 1849).

In the following cases the court held the power terminated by

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<sup>14</sup> See note 14 on following page.

In accordance with this distinction, it has been held that the power of sale in an ordinary mortgage, being coupled with an interest or estate, is not revoked by the death of the mortgagor;<sup>15</sup> but in states where by statute a mortgage is declared to be a mere security for debt, passing no title or estate in the land to the mortgagee, the power of sale has generally been held to be incapable of execution after the death of the mortgagor.<sup>16</sup> An authority which is coupled with an interest is not revoked by the bankruptcy<sup>17</sup> or insanity<sup>18</sup> of the principal, and it would seem that the result would be the same if the authority were given as a security, so as to be irrevocable by act of the principal, although not, strictly speaking, coupled with an interest.

the principal's death, although it was such a power that it was irrevocable in his life: *Fisher v. Trust Co.*, 138 N. C. 90, 50 S. E. 592 (1905); *Dailey v. Doherty*, 237 Mass. 365, 129 N. E. 678 (1921).

<sup>14</sup> *Houghtaling v. Marvin*, 7 Barb. 412 (N. Y. 1849); *Leavitt v. Fisher*, 11 N. Y. 1 (Super. Ct. 1854). See *Willingham v. Rushing*, 105 Ga. 72, 31 S. E. 130 (1898); *Mulloney v. Black*, 244 Mass. 391, 138 N. E. 584 (1923).

<sup>15</sup> *Bergen v. Bennett*, 1 Caines, Cas. 1, 2 Am. Dec. 281 (N. Y. 1804); *Berry v. Skinner*, 30 Md. 567 (1869); *Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104 (1886); *Harvey v. Smith*, 179 Mass. 592, 61 N. E. 217 (1901), chattel mortgage; *Jones, Mtg.* § 1792.

"Strictly speaking, a mortgage vests the whole in the mortgagee. His title to the land is complete as a legal title, and the power of sale is to relieve him of the equities attached to the mortgage." Per Hoar, J., *Varnum v. Meserve*, 90 Mass. (8 Allen) 158 at 159 (1864).

<sup>16</sup> *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636 (1887); *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84 (1891). Otherwise when other provisions of statute declare the power to be a trust and part of the security. *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780 (1894).

<sup>17</sup> *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476 (1875); *Wood v. Kerkeslager*, 225 Pa. 296, 74 Atl. 174 (1909).

Where the owner of shares of stock in a national bank delivered his certificate, together with a power of attorney to transfer the same, to secure his note, the power was coupled with an interest, and was not revoked by the bankruptcy of the constituent. *Dickinson v. Bank*, 129 Mass. 279, 37 Am. Rep. 351 (1880). See, also, *Crowfoot v. Gurney*, 9 Bing. 372, 131 Rep. 655 (1832).

<sup>18</sup> *Berry v. Skinner*, 30 Md. 567 (1869).

Yet, in spite of the almost universal acceptance of Hunt v. Rousmanier as a correct statement of the law, it must be conceded that many cases have given a broader interpretation to the term "coupled with an interest" than can be justified by the language or the reasoning of that decision, which demand that the authority be accompanied by a conveyance or assignment of the legal title.<sup>19</sup> Thus, in the leading case of Knapp v. Alvord,<sup>20</sup> where the power authorized the attorney to sell personal property and to apply the proceeds to the payment or security of a note indorsed by himself and another, it was held that the fact that the power was accompanied by a delivery of possession was enough to couple the power with an interest, and that the power survived the death of the constituent. "As the possession of the property was delivered to Meads," said Chancellor Walworth, "in connection with this power to dispose of it for the security and protection of himself

<sup>19</sup> Where the agent was authorized to sell goods, and out of the proceeds pay liens and other claims, and apply the balance to payment of notes held by him, the authority was not extinguished by the principal's death. *Merry v. Lynch*, 68 Me. 94 (1878).

Where an instrument authorized an attorney to collect rents from mortgaged premises, and to apply upon the mortgage, and contained a clause assigning as security the rents under the present or any future lease, the authority was not revoked by death of the grantor. *Kelly v. Bowerman*, 113 Mich. 446, 71 N. W. 836 (1897).

An agreement between joint owners of land, providing that either may sell to pay purchase-money notes, and that the legal title, if either dies before the notes are payable, shall vest in the survivor, to sell and dispose of and to pay such notes, is an authority coupled with an interest, which does not terminate on the death of one of the parties. *Carleton v. Hausler*, 20 Tex. Civ. App. 275, 49 S. W. 118 (1899).

Where the principal executed an agreement authorizing the agent, who had loaned P. money, to collect certain rents and apply them on the principal's indebtedness, the authority was coupled with an interest, and did not terminate upon the principal's death. *Stephens v. Sessa*, 50 App. Div. 547, 64 N. Y. Supp. 28 (1900).

See, also, *Raymond v. Squire*, 11 Johns. 47 (N. Y. 1814); *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780 (1894); *Mulloney v. Black*, 244 Mass. 391, 138 N. E. 584 (1923).

<sup>20</sup> 10 Paige 205, 40 Am. Dec. 241 (N. Y. 1843).

and the other indorsers, the property must be considered as pledged to him for that purpose. The power to sell, therefore, was coupled with an interest in the property thus pledged, and survived." Indeed, the reasoning of the chancellor goes far to show that he would have been willing to rest the decision upon the existence of an equitable lien upon the property, which he was satisfied was created by the clause in the power authorizing the sale of the property, and the application of the proceeds to the payment of the notes secured; and upon principle it is submitted that this view is correct, and that such a power, although containing no words of conveyance or assignment, is properly to be construed in connection with all the circumstances as creating an equitable lien or right enforceable by the courts, even after the death of the constituent.<sup>21</sup>

The English decisions appear in the main to be in accord with the decisions in this country, although a different and broader definition is given to the term "authority coupled with an interest." In *Walsh v. Whitcomb*,<sup>22</sup> where an insolvent executed a power of attorney together with a general assignment of all his effects to a creditor, authorizing the attorney to collect all outstanding debts for the benefit of creditors, it was held that the principal could not revoke the power. "There is," said Lord Kenyon, "a difference in cases of powers of attorney; in general, they are revocable from their nature, but there are these exceptions: 'Where a power of attorney is part of a security for money, then it is not revocable; where a power of attorney was made to levy a fine, as part of a security, it was held not to be revocable; the principle is applicable in every case where a power of attorney is necessary to effect any security; such is not revocable.'" In *Watson v. King*,<sup>23</sup> it

<sup>21</sup> See Bowstead, Ag. (1919 Ed.) § 138. Cf. *American Loan & Trust Co. v. Billings*, 58 Minn. 187, 59 N. W. 998 (1894).

<sup>22</sup> 2 Esp. 565 (1797).

<sup>23</sup> 4 Camp. 272 (1815). See, also, *Lepard v. Vernon*, 2 Ves. & B. 51, 35 Rep. 237 (1813).

was held that an authority to sell certain shares of a ship given by a debtor to his creditor terminated upon the constituent's death. The power was not accompanied by an assignment, and the decision is thus in accord with *Hunt v. Rousmanier*; but it is to be observed that Lord Ellenborough referred to the power as a "power coupled with an interest," saying that as such it was necessarily revoked by the principal's death,<sup>24</sup> whereas Chief Justice Marshall, employing the term with a different meaning, would have declared that the power was revoked by the principal's death, because it was not coupled with an interest. In *Raleigh v. Atkinson* (revocable by notice from P. or his assignee in bankruptcy),<sup>25</sup> goods having been consigned to a factor for sale, with a limit as to the price, he made advances, and afterwards the principal gave him authority to sell at the market price, and to retain the amount of his advances. It was held that the authority was revocable, because there was no consideration for the agreement. In *Gaussin v. Morton*<sup>26</sup> it was held that a power of attorney executed by a debtor and authorizing his creditor to sell certain lands and to discharge his debt out of the proceeds was coupled with an interest and irrevocable by act of the principal. In *Smart v. Sandars*<sup>27</sup> it was held that a factor to whom goods had been consigned for sale did not, by making advances, acquire such an interest as to render the authority irrevocable; while it was said that, if the advances had been made in consideration of an agreement that the authority to sell should not be revoked, it would have been irrevocable. Wilde, C. J., after referring to the cases above cited, said: "The result appears to be that, where an

<sup>24</sup> "A power, coupled with an interest, cannot be revoked by the person granting it, but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?" Per Lord Ellenborough, *Watson v. King*, 4 Camp. 272, at page 274 (1815).

<sup>25</sup> 6 M. & W. 670, 151 Rep. 581 (1840).

<sup>26</sup> 10 B. & C. 731, 109 Rep. 622 (1830).

<sup>27</sup> 5 C. B. 895, 136 Rep. 1132 (1848).

agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. That is what is meant by an authority coupled with an interest, and which is commonly said to be irrevocable." This rule has been approved by later cases.<sup>28</sup>

It is to be observed that, in spite of the different use of the term "authority coupled with an interest," the rule declared by Wilde, C. J., differs little, if at all, from that declared by Marshall, C. J., when he said that, "where a letter of attorney forms part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it \* \* \* is deemed irrevocable in law."<sup>29</sup> Whether such an authority, if not accompanied by the conveyance or assignment of an interest in the thing, is revoked by the death of the principal, does not appear to have been considered in any English case since Watson v. King.<sup>30</sup>

It is not necessary, in order to render an authority irrevocable, that it be vested in the person to be benefited by

<sup>28</sup> De Comas v. Prost, 3 Moore, P. C. (N. S.) 158, 16 Rep. 59 (1865).

P. promoted a company for the purpose of purchasing from him and working a mining property. C. signed an underwriting letter addressed to P., by which he agreed, in consideration of a commission, to subscribe for 1,000 shares in the company, and that the agreement and application should be irrevocable, and, notwithstanding any repudiation by him, should be sufficient to authorize P. to apply for the shares on behalf of C., and the company to allot them. P., by letter, accepted the terms. Subsequently C. wrote to P., and to the company, repudiating the agreement; but P. applied on behalf of C. for the shares, and the company allotted them, and placed C.'s name on the register. Held, that C. was not entitled to have his name removed, since the authority was coupled with an interest, and therefore not revocable. Lopes, L. J., said: "The object was to enable Mr. Phillips, the vendor, to obtain his purchase money, and \* \* \* it therefore conferred a benefit on the donee of the authority." In re Hannan's Empress Gold Mining & D. Co., [1896] 2 Ch. 643.

<sup>29</sup> Hunt v. Rousmanier, 21 U. S. (8 Wheat.) 174, 5 L. Ed. 589 (1823).

<sup>30</sup> See footnote 23, p. 245, supra.

its exercise, but the beneficiary may be a third person.<sup>31</sup> Thus, where a debtor authorizes another to sell property and to pay the proceeds to a creditor, the authority becomes irrevocable upon the creditor's acceptance of the security.<sup>32</sup> If the authority is accompanied by a conveyance or assignment of an interest, the authority is not revoked by the principal's death.<sup>33</sup> So, if a debtor, having funds in the hands of an agent, authorizes him to pay the debtor's creditor, and the agent promises the creditor to pay him or to hold the funds to his use, the principal can no longer revoke the authority,<sup>34</sup> nor would it seem to be revoked by his death.

#### AUTHORITY COUPLED WITH AN OBLIGATION

89. When an agent is employed to engage in a course of action which, if left incomplete, will result in liability or detriment to the agent, the authority becomes irrevocable, unless the principal protects the agent from such liability or detriment.

While an authority conferred for the benefit of the principal, and not as a means of securing some benefit to the

<sup>31</sup> Walsh v. Whitecomb, 2 Esp. 565 (1797); Kindig v. March, 15 Ind. 248 (1860), warrant of attorney to confess judgment; Wood v. Kerkeslager, 225 Pa. 296, 74 Atl. 174 (1909); Mulloney v. Black, 244 Mass. 391, 138 N. E. 584 (1923).

<sup>32</sup> American Loan & Trust Co. v. Billings, 58 Minn. 187, 59 N. W. 998 (1894).

<sup>33</sup> Hunt v. Rousmanier, 21 U. S. (8 Wheat.) 174, 5 L. Ed. 589 (1823). Where a deed or a power of attorney executed by a member of an underwriters' association authorized the agent to adjust and pay losses, and provided for a deposit of money by the members with the agent, which was a trust fund for protection of the insured, the power was coupled with an interest, and was not revoked by death of a member as to losses under policies issued during his lifetime. Durbrow v. Eppens, 65 N. J. Law, 10, 46 Atl. 582 (1900).

<sup>34</sup> Hodgson v. Anderson, 3 B. & C. 842, 107 Rep. 945 (1825); Crowfoot v. Gurney, 9 Bing. 372, 131 Rep. 655 (1832); Goodwin v. Bowden, 54 Me. 425 (1867).

Cf. Simonton v. Bank, 24 Minn. 216 (1877).

agent, is ordinarily revocable,<sup>35</sup> it seems that an authority may become irrevocable, if its continuance is necessary to secure the agent against liability already incurred in favor of a third person. It is true that the principal must indemnify the agent for any loss sustained or liability incurred in the course of the agency, and this is ordinarily the agent's sole protection or security.<sup>36</sup> But if an agent is employed to do an act involving personal liability, and is given authority to discharge the liability on behalf of the principal, it would be manifestly unjust to permit the principal to revoke the authority after the liability has been incurred, at least without fully indemnifying the agent. For example, if an agent is authorized to make a contract in his own name, and to discharge it out of moneys of the principal in his hands, it seems that the authority to use the funds for that purpose becomes irrevocable as soon as the contract has been entered into, provided that the principal does not himself discharge the contract or provide other funds, or at least secure the agent against loss. There is not much authority squarely supporting this proposition,<sup>37</sup> but its soundness has been approved by high authority.<sup>38</sup>

<sup>35</sup> See section 86, supra.

<sup>36</sup> See section 156, infra.

<sup>37</sup> *Phex Co. v. Salem Fruit Union*, 103 Or. 514, 201 Pac. 222, 205 Pac. 970, 25 A. L. R. 1090 (1922). See *Read v. Anderson*, 10 Q. B.

<sup>38</sup> "If a principal employs an agent to perform an act, and if upon revocation of the authority the agent will be by law exposed to loss or suffering, the authority cannot be revoked. But in the present case no claim could be lawfully enforced against the agent." Per Brett, M. R., dissenting, in *Read v. Anderson*, 13 Q. B. D. 779, at page 781 (1884).

"There is a qualification of the rule where the agent has entered upon the execution of the authority before revocation, and has so bound himself that a retraction of the authority would subject him to liability. In such cases the principal cannot revoke the authority as to the part of the transaction remaining unexecuted, at least not without indemnifying the agent." Per Andrews, C. J., in *Terwilliger v. Railroad Co.*, 149 N. Y. 86, at page 92, 43 N. E. 432 (1896). *Bowstead* (1919 Ed.) Dig. Ag. 138.

D. 100 (1882), affirmed 13 Q. B. D. 779 (1884); *Hess v. Rau*, 95 N.Y. 359 (1884), affirming 49 N.Y. Super. Ct. 324 (1883).

Cf. *Perry v. Barnett*, 15 Q. B. D. 388 (1885); *Tatam v. Reeve*, 1 Q. B. 44 (1892); *Seymour v. Bridge*, 14 Q. B. D. 460 (1885); *Anson, Contr.* 359.

In *Read v. Anderson*, supra, it was held that a turf commission agent could recover the amount of bets made by him in his own name at the request of and for defendant, and paid by the plaintiff to the winners, although defendant had directed him not to pay. The trial judge took the view that the agent's authority to pay the bets, if lost, was a security against any loss which might result from the personal obligation to pay the bets, and was thus coupled with an interest, and that it was immaterial that the obligation was not legally enforceable, since its nonfulfillment would injure the plaintiff's business. It was said that the case might be supported on the ground that the principal was bound to indemnify the agent against the consequences of the act. The judgment was affirmed by the Court of Appeal apparently on the second ground. "The plaintiff," said Bowen, J., "has placed himself in a position of pecuniary difficulty at the defendant's request, who impliedly contracted, I think, to indemnify him from the consequences which would ensue, in the ordinary course of his business, from this step." Page 783.

It is true that where a debtor, having funds in the hands of an agent, authorizes him to pay a creditor, and the agent promises the creditor to pay, the authority is irrevocable by P. in his lifetime, but in that case the creditor acquires an irrevocable right with respect to the funds. *Crowfoot v. Gurney*, 9 Bing. 372, 131 Rep. 655 (1832); *Hodgson v. Anderson*, 3 B. & C. 842, 107 Rep. 945 (1825); *Goodwin v. Bowden*, 54 Me. 425 (1867).

## CHAPTER XII

### UNDISCLOSED PRINCIPAL

- 90. Introduction and Definition of Terms.
  - Action by T. against P.—
    - General Rule.
  - 92. Ratification by Undisclosed Principal.
  - 93. Exceptions to Liability.
  - 94. Defense of Payment by P. to A.
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    - Action by P. against T.—
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      - General Rule.
    - 101. Defenses.
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### INTRODUCTION AND DEFINITION OF TERMS

- 90. Except as between P. and A., the failure of T. to know the existence or identity of P. causes legal results different from those found in cases of disclosed principal. A principal is said to be "unnamed," if T. does not know the identity of P., but does know that A. is representing some one. A principal is said to be undisclosed if T. does not know either the identity or the existence of a principal.

The authority and power of an agent to bind his disclosed principal to T. in contract has been discussed.<sup>1</sup> In the cases of undisclosed principal, T. has dealt with A., believing A. to be the principal and intending to contract with A., the person before him. Later it is discovered that A. was really intending to act as agent of P. What are the lia-

<sup>1</sup> Chapters II, III, and IV, supra.

bilities and rights of P., A., and T. under these circumstances? Between the cases of disclosed and undisclosed principal there is an intermediate group of cases which may be called those of "unnamed" principal.<sup>2</sup> In these T. knows that A. represents some one, but does not know the identity of P. It can readily be seen that the rules applicable to this intermediate group of cases will differ from those applicable to either of the other groups.<sup>3</sup> The conferring of rights and liabilities upon the "undisclosed" or "unnamed" principal is one of the unique features of the law of principal and agent. In a suit by P. against A., or by A. against P., there is no change of legal relation because P. was undisclosed or unnamed to T. There are consequently four situations which must be considered: (1) T.'s rights as against P.;<sup>4</sup> (2) P.'s rights as against T.;<sup>5</sup> (3) T.'s rights as against A.;<sup>6</sup> and (4) A.'s rights as against T.<sup>7</sup>

<sup>2</sup> *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558 (N. Y. 1833); *Irvine & Co. v. Watson & Sons*, L. R. 5 Q. B. D. 414 (1880).

<sup>3</sup> The unnamed P. cases are treated as if P.'s identity had been disclosed:

(1) When T. sues P., under English rule as to P.'s defense based on payment to A. See footnotes 38 and 39, p. 263, infra.

(2) When P. sues T., as to defenses based on set-offs. See footnote 68, p. 271, infra.

(3) When T. sues A., in a few jurisdictions. See footnote 76, p. 274, infra.

The unnamed P. cases are treated like undisclosed principal cases:

(1) When T. sues P., as to T.'s right to sue. See footnote 12, p. 254, infra.

(2) When P. sues T.:

(a) As to P.'s right to sue. See footnote 55, p. 267, infra.

(b) As to T.'s defense based on payment. See footnote 69, p. 272, infra.

(3) When T. sues A. in most jurisdictions. See footnote 75, p. 274, infra.

<sup>4</sup> Sections 91-95, infra.

<sup>5</sup> Sections 96-98, infra.

<sup>6</sup> Sections 99, 100, infra.

<sup>7</sup> Sections 101, 102, infra.

**ACTION BY T. AGAINST P.—GENERAL RULE**

**91.** The general rule is that T. can hold the undisclosed P. on the contract negotiated by A. with T., whether the contract be executed or executory, in spite of the statute of frauds and the parol evidence rule, provided A.'s contract is actually authorized or within the power of like agents.

Where T. has sold certain merchandise to A., representing an undisclosed principal, and the principal has received the benefit of the contract, he would be unjustly enriched<sup>8</sup> if he were not compelled to pay the purchase price of the goods. In cases of this type the doctrine of the liability of an undisclosed principal had its inception.<sup>9</sup> The right given to T. to sue P. was additional to the right which he had obtained against A. by the original contract.<sup>10</sup> The liability of P. to T., originating in executed contracts to prevent unjust enrichment, was soon extended by analogy to executory contracts as well,<sup>11</sup> so that it is now the general

<sup>8</sup> Lewis "Undisclosed Principal," 9 Col. Law Rev. 116, at pages 124, 125.

"Now, upon the evidence, it appears that the defendant (P.) had the goods and has not paid for them, either to McKune (A.) or to the present plaintiffs (T.) or to anybody else. \* \* \* The justice of the case, as it seems to me, is that he should pay the plaintiffs, who were the sellers, and not any other person." Bayley, J., in *Thomson v. Davenport*, 9 B. & C. 78, at page 90, 109 Rep. 30 (1829).

<sup>9</sup> *Upton v. Gray*, 2 Me. (2 Greenl.) 373 (1823). See Holmes, Agency, 5 Harv. Law Rev. 1-4. Lewis, Undisclosed Principal, 9 Col. Law Rev. 116, gives an extensive discussion of the theory of this liability.

It is possible to regard the entire doctrine of undisclosed principal as a manifestation of the entrepreneur basis for vicarious liability. Thus the rights as between A. and T. are determined by the law of contracts, but P. has rights and liabilities because he is the one who is conducting the enterprise in the course of which the contract between A. and T. is made. This gives a particularly good explanation of such cases as *Watteau v. Fenwick*, [1893] 1 Q. B. 346, and others discussed in footnote 18, p. 256, infra.

<sup>10</sup> See section 99, infra.

<sup>11</sup> *Episcopal Church v. Wiley*, 2 Hill. Eq. 584, 30 Am. Dec. 386 (S.

rule that T. can sue the undisclosed or unnamed principal upon any contract which A., acting for P., has negotiated with T.<sup>12</sup>

It was early urged that the statute of frauds prevented a recovery by T. against P. on a contract within the provisions of that statute, because of the absence of P.'s signature thereto.<sup>13</sup> Thus it was urged that the parol evidence rule prevented the introduction of evidence to show that a writing signed by A. had been signed by A. acting as agent for P.<sup>14</sup> The question has been settled adversely to P.<sup>15</sup> "There is no doubt,"<sup>16</sup> said Parke, B., "that, where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the con-

C. 1837); *Violett v. Powell's Adm'r*, 49 Ky. (15 B. Mon.) 347, 52 Am. Dec. 548 (1850); *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340 (1903).

<sup>12</sup> *Upton v. Gray*, 2 Me. (2 Greenl.) 373 (1823); *Thomson v. Davenport*, 9 B. & C. 78, 109 Rep. 30 (1829); *Lamb v. Thompson*, 31 Neb. 448, 48 N. W. 58 (1891); *Waddill v. Sebree*, 88 Va. 1012, 14 S. E. 849, 29 Am. St. Rep. 766 (1892); *Steele-Smith Grocery Co. v. Potthast*, 109 Iowa, 413, 80 N. W. 519 (1899); *Lindeke Land Co. v. Levy*, 76 Minn. 364, 79 N. W. 314 (1899); *Yates v. Repetto*, 65 N. J. Law, 294, 47 Atl. 632 (1900); *LEVITT v. HAMBLET*, [1901] 2 K. B. 53, *Powell, Cas. Agency*, 233, customer of stockbroker who buys shares in accordance with regulations of stock exchange in his own name; *Simmons Hardware Co. v. Todd*, 79 Miss. 163, 29 South. 851 (1901); *Belt v. Power Co.*, 24 Wash. 387, 64 Pac. 525 (1901).

This liability is further justified by the fact that, as between the principal and agent, the principal is primarily liable, and hence allowing the third person to sue the principal directly eliminates circuity of action.

<sup>13</sup> See cases in footnote 15, p. 254, *infra*.

<sup>14</sup> See cases in footnote 15, p. 254, *infra*.

<sup>15</sup> *Higgins v. Senior*, 8 M. & W. 834, 151 Rep. 1278 (1841); *LERNED v. JOHNS*, 91 Mass. (9 Allen) 419, *Powell, Cas. Agency*, 236 (1864); *Coleman v. First Nat. Bank*, 53 N. Y. 388 (1873); *Darrow v. Prod. Co.*, 57 Fed. 463 (C. C. 1893); *Lindeke Land Co. v. Levy*, 76 Minn. 364, 79 N. W. 314 (1899); *Belt v. Power Co.*, 24 Wash. 387, 64 Pac. 525 (1901); *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340 (1903).

See comment in 14 Col. Law Rev. 613.

<sup>16</sup> *Higgins v. Senior*, 8 M. & W. 834, 151 Rep. 1278 (1841).

tract, so as to give the benefit of the contract, on the one hand, to, and charge with liability, on the other, the unnamed principals, and this, whether the agreement be or be not required to be in writing by the statute of frauds, and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but it shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal." It should be noted that these decisions permit parol evidence to charge an additional party, P., but refuse to allow it to relieve A., the signer of the instrument, from liability.

There have been some cases in which the written instrument has contained language so strongly affirming that A. is the real principal that courts have refused to allow the parol testimony on the ground that the effect of such evidence would be to vary the written instrument.<sup>17</sup> It is submitted that the distinction made is unsound, as every contract made by T. with A. shows that the parties intended to contract with each other and that P. was unthought of by T. Hence the variance is equally present in every case. If utility justifies the imposition of liability on P. in one case, it does equally in all.

It might be expected that the liability of an undisclosed principal would be confined to cases where the contract was within the actual authority of the agent, and would not be extended to cases where the contract, although within the ordinary authority of an agent to whom the particular business has been delegated, is in violation of his special instructions; in other words, that the rule of so-called

<sup>17</sup> *Humble v. Hunter*, L. R. 12 Q. B. 310, 116 Rep. 885 (1848); *Western Sugar Co. v. Helvetia, etc.*, Ins. Co., 163 Fed. 644 (C. C. 1908); *CROWDER v. YOVOVICH*, 84 Or. 41, 164 Pac. 576, Powell, Cas. Agency, 263 (1917).

See another, but sounder, basis on which the same result could be reached in most cases of this type at footnote 61, p. 269, infra.

"apparent" or "ostensible" authority could have no application. But in the tort field the entrepreneur was charged with those expenditures incidental to the carrying on of his enterprise, and so here the courts, proceeding upon the analogy of a dormant partner, hold the undisclosed principal liable, notwithstanding that the agency is unknown to the other party, provided the contract is a usual one to be made by an agent employed in that capacity.<sup>18</sup> Thus, where the defendants carried on the business of a beer house by means of an agent, who conducted it in his own name, it was held that they were liable to the plaintiff for cigars and other articles such as would usually be supplied to and dealt in at such an establishment, supplied to the agent, although the plaintiff gave credit only to him, and he had been forbidden to buy such articles on credit. "Once it is established," said Wills, J., "that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority, which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or, at least, in every case where the fact of there being a principal was undisclosed, the secret limitation of the authority would prevail, and defeat the action of the person dealing with the agent, and then discovering that he was an agent

<sup>18</sup> Hatch v. Taylor, 10 N. H. 538 (1840); Watteau v. Fenwick, [1893] 1 Q. B. 346, and comment thereon in 7 Harv. Law Rev. 49. See, also, Hubbard v. Ten Brook, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585 (1889); BROOKS v. SHAW, 197 Mass. 376, 84 N. E. 110, Powell, Cas. Agency, 237 (1908).

Cf. Edmunds v. Bushell, L. R. 1 Q. B. 97 (1865); Ex parte Dixon, 4 Ch. D. 133 (1876).

and had a principal. But in case of a dormant partner it is clear law that no limitation as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion.”<sup>19</sup>

#### ACTION BY T. AGAINST P.—RATIFICATION BY UNDISCLOSED PRINCIPAL

##### 92. Ratification is not generally allowed as to unauthorized acts on behalf of an undisclosed principal.

If, however, the act of the agent has been in fact unauthorized, and not even within the usual power of agents of that type, the rights and liabilities of the undisclosed principal depend upon the possibility of ratification by an undisclosed principal. Ratification generally requires as a condition precedent proof that the agent purported to act as agent of the proposed ratifier.<sup>20</sup> This is, of course, never present in a case of undisclosed principal, and the weight of authority soundly excludes ratification from cases of undisclosed principal.<sup>21</sup> Massachusetts, however, distinguishes cases in which A. intended to act on behalf of an undisclosed principal and permits ratification in these cases.<sup>22</sup> It is submitted that this heaps one anomaly of the law of agency, ratification, upon what has been regarded as another anomaly of this law, undisclosed principal, and serves no useful purpose.<sup>23</sup>

<sup>19</sup> Watteau v. Fenwick, [1893] 1 Q. B. 346.

<sup>20</sup> See section 48, supra.

<sup>21</sup> See section 48, supra, footnote 33, p. 137.

<sup>22</sup> See discussion in footnote 33, p. 137, section 48, supra.

<sup>23</sup> Cf. 22 Col. Law Rev. 465.

### ACTION BY T. AGAINST P.—EXCEPTIONS TO LIABILITY

93. An undisclosed principal, generally, cannot be sued by T.

- (1) On a sealed instrument signed by A. and T.
- (2) On a negotiable instrument signed by A.
- (3) Where A. has made a single contract on behalf of two or more principals.

However, there are certain exceptions to the liability of the undisclosed P. to T. It was a rule of the common law, based upon the difference between simple and formal contracts, that no one who is not named in or described as a party to an instrument under seal can sue or be sued upon it.<sup>24</sup> Consequently the rules as to undisclosed principal have been held to be inapplicable to sealed instruments.<sup>25</sup>

"In the next place, the rule which permits an undisclosed principal to sue and be sued on a contract to which he is not a party, though well settled, is itself an anomaly, and to extend it to the case of a person who accepts the benefit of an undisclosed intention of a party to the contract would, in my opinion, be adding another anomaly to the law and not correcting an anomaly." Lord Davey, in KEIGHLEY, MAXSTED & CO. v. DURANT, [H. L. 1901] A. C. 240, Powell, Cas. Agency, 130.

<sup>24</sup> Kiersted et al. v. O. & A. R. R. Co., 69 N. Y. 343, 25 Am. Rep. 199 (1877); Henricus v. Englert, 137 N. Y. 488, 33 N. E. 550 (1893); Van Dyke v. Van Dyke, 123 Ga. 686, 51 S. E. 582, 3 Ann. Cas. 978 (1905); FINBERG v. DE GOODE, 199 App. Div. 177, 191 N. Y. Supp. 390, Powell, Cas. Agency, 239 (1921).

<sup>25</sup> Schack v. Anthony, 1 M. & S. 573, 105 Rep. 214 (1813); Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617 (1876); Kiersted v. O. & A. R. R. Co., 69 N. Y. 343, 25 Am. Rep. 199 (1877); Tuthill v. Wilson, 90 N. Y. 423 (1882); Borcherling v. Katz, 37 N. J. Eq. 150 (1883); Haley v. Belting Co., 140 Mass. 73, 2 N. E. 785 (1885); Henricus v. Englert, 137 N. Y. 488, 33 N. E. 550 (1893); Farrar v. Lee, 10 App. Div. 130, 41 N. Y. Supp. 672 (1896); Badger Silver Min. Co. v. Drake, 88 Fed. 48, 31 C. C. A. 378 (1898); Sanger v. Warren, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913 (1898), holding that the rule is not changed by statute providing that no seal is necessary to validity of any instrument in writing, and that addition or omission of seal does not

If the parties have affixed a seal to an instrument not required by law to be sealed, most jurisdictions allow the seal to be disregarded and the rules of undisclosed principal to be applied.<sup>26</sup> Some jurisdictions exclude the rights and liabilities of the undisclosed principal whenever the instrument is in fact sealed, whether it had to be so sealed or not.<sup>27</sup> This question is becoming of increased importance because of quite general legislation dispensing with the necessity of a seal.<sup>28</sup> The preservation of the technical rule of the common law as to sealed instruments is of doubtful value, but its abolition probably will require a statute.<sup>29</sup>

Commercial convenience established the rule of the law merchant that no one who is not named in or described as a party to a negotiable instrument can maintain an action or be charged upon it.<sup>30</sup> Parol evidence to show who is the real principal is inadmissible. Thus, the doctrines of undisclosed principal are inapplicable to negotiable in-

affect the same; *Lenney v. Finley*, 118 Ga. 718, 45 S. E. 593 (1903). Cf. *O'Grady v. Howe & Rogers Co.*, 166 App. Div. 552, 152 N. Y. Supp. 79 (1915).

<sup>26</sup> *Stowell v. Eldred*, 39 Wis. 614 (1876); *Cook v. Gray*, 133 Mass. 106 (1882); *Lancaster v. Ice Co.*, 153 Pa. 427, 26 Atl. 251 (1892); *DONNER v. WHITECOTTON*, 201 Mo. App. 443, 212 S. W. 378, Powell, Cas. Agency, 240 (1919).

<sup>27</sup> *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617 (1876); *Sanger v. Warren*, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913 (1898); *Van Dyke v. Van Dyke*, 123 Ga. 686, 51 S. E. 582, 3 Ann. Cas. 978 (1905); *Tribune Co. v. Wendell*, 192 Ill. App. 639 (1915).

<sup>28</sup> Williston on Contracts, § 218.

<sup>29</sup> In *Lagumis v. Gerard*, 116 Misc. Rep. 471, 190 N. Y. Supp. 207 (Sept., 1921), Judge Cropsey made an effort to discard the rule that an undisclosed principal may not sue on a sealed instrument. The decision, while representing a desirable change in our law, is not likely to be followed by the courts in the absence of statute. Thus, in December, 1921, in the case of *FINBERG v. DE GOODE*, 199 App. Div. 177, 191 N. Y. Supp. 390, Powell, Cas. Agency, 239, the Appellate Division, Second Department, applied the old rule. See comments in 35 Harv. Law Rev. 339, 22 Col. Law Rev. 82, and 20 Mich. Law Rev. 441. Cf. *Stanton v. Granger*, 125 App. Div. 174, 109 N. Y. Supp. 134, affirmed 193 N. Y. 656, 87 N. E. 1127 (1908).

<sup>30</sup> *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558 (N. Y. 1833). Cf. *Harper v. Bank*, 54 Ohio St. 425, 44 N. E. 97 (1896).

struments.<sup>31</sup> Many conflicting decisions exist as to what form is sufficient to constitute the naming or description of the principal and as to what will constitute a sufficient ambiguity to permit the introduction of parol evidence. These will be considered later.<sup>32</sup>

Many courts allow T. to bring suit against the undisclosed principal upon the original transaction, disregarding the negotiable instrument which A. has given to T.,<sup>33</sup> although this same device has been ineffectual where the instrument was sealed rather than negotiable.<sup>34</sup>

Where A. had lumped the orders of two principals, the identity of neither being known to T., it was held that T. could not maintain an action against either principal.<sup>35</sup>

<sup>31</sup> Cannot be charged: *Siffkin v. Walker*, 2 Camp. 308 (1809); *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558 (N. Y. 1833); *Williams v. Robbins*, 82 Mass. (16 Gray) 77, 77 Am. Dec. 396 (1860); *Arnold v. Sprague*, 34 Vt. 402 (1861); *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225 (1868); *In re Adansonia Co.*, L. R. 9 Ch. App. 635 (1874); *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. Ed. 903 (1883); *Ranger v. Thalmann*, 84 App. Div. 341, 82 N. Y. Supp. 846, affirmed 178 N. Y. 574, 70 N. E. 1108 (1904).

But if the name of the principal is not disclosed, and the seller does not rely exclusively upon the credit of the agent, he may, upon the dishonor of the paper, charge the principal for goods sold and delivered. *Pentz v. Stanton*, *supra*. See, also, *Harper v. Bank*, 54 Ohio St. 425, 44 N. E. 97 (1896).

Cannot sue: See section 97, post, footnote 58, p. 268.

<sup>32</sup> See section 122, *infra*.

<sup>33</sup> *COALING C. & C. CO. v. HOWARD*, 130 Ga. 807, 61 S. E. 987, 21 L. R. A. (N. S.) 1051, Powell, Cas. Agency, 246 (1908), and comment thereon in 22 Harv. Law Rev. 56.

<sup>34</sup> *Van Dyke v. Van Dyke*, 123 Ga. 686, 51 S. E. 582, 3 Ann. Cas. 978 (1905).

<sup>35</sup> *Beckhusen v. Hamblet*, 16 T. L. R. 278 (1900), and note thereon in 14 Harv. Law Rev. 146.

**ACTION BY T. AGAINST P.—DEFENSE OF PAYMENT BY P. TO A.**

94. In England payment by P. to A. bona fide and in regular course of business is a bar to an action brought by T.:

- (1) If T. had not yet realized that he was dealing with the agent for some one; or
- (2) If P. has been induced to pay A. by conduct of T. entitling P. to believe that T. had already been paid by A., or that T. had elected to give exclusive credit to the agent.

In most of the United States such payment by P. to A. is always a defense.

While the other party to the contract may, as a rule, upon discovering the existence of a principal, resort to him for performance of the contract, it is obvious that the strict application of the rule will result in hardship, if not injustice, to the principal, if he has in the meantime settled with the agent and is compelled again to settle with the other party. The cases are in conflict as to whether settlement with the agent under such circumstances is a defense when the principal is subsequently called upon by the other party for performance, or whether it is a defense only provided the principal has made the settlement in the belief, induced by the words or conduct of the other party, that a settlement has already been made by the agent; in other words, whether or not the defense rests upon the ground of estoppel. The question usually arises where a contract of purchase has been made on behalf of an undisclosed principal, who, when called upon by the seller for payment, has already paid the agent for the goods.

In Thomson v. Davenport<sup>36</sup> the judges gave expression to certain dicta, the correctness of which has been the sub-

<sup>36</sup> 9 B. & C. 78, 109 Rep. 30 (1829).

ject of much subsequent discussion. "I take it to be the general rule," said Lord Tenterden, "that if a person sells goods (supposing at the time he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification: That the state of the account between the principal and the agent is not altered to the prejudice of the principal." And Bayley, J., with more elaboration, said: "If the agent does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification: That the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent."

In *Heald v. Kenworthy*,<sup>37</sup> however, the foregoing dicta were disapproved, and Parke, B., said: "The expression 'make it unjust,' is very vague; but, if rightly understood, what the learned judge said is, no doubt, true. If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent on the faith that the agent and the seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. \* \* \* I think that there is no case of this kind where the plaintiff has been precluded from recover-

<sup>37</sup> 10 Ex. 739 (1855).

ing, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position." The reasoning is, in short, that the principal, having originally authorized his agent to create a debt, cannot be discharged from it except by payment, unless the seller has estopped himself by his conduct from enforcing it against the principal. In this case it did not distinctly appear that the seller was ignorant of the existence of a principal, although the language of the judges is broad enough to cover the case where the agency is undisclosed, as well as the case where merely the name of the principal is undisclosed.

In *Armstrong v. Stokes*,<sup>38</sup> however, it was held that, where the seller sells the goods to the agent, supposing at the time he is dealing with him as principal, and ignorant of the existence of any agency, payment by the principal to the agent is a defense, notwithstanding the absence of facts creating an estoppel against the seller; the court thus limiting the commercially undesirable rule of *Heald v. Kenworthy*. Thus the English rule seems to be that payment by P. to A., bona fide and in regular course of business, is a bar to an action brought by T. against P.: (1) If T. had not yet realized that he was dealing with the agent for some one; or (2) if P. had been induced to pay A. by conduct of T. entitling P. to believe that T. had already been paid by A., or that T. had elected to give exclusive credit to the agent.<sup>39</sup> It is submitted that this rule is cumbersome and unsound in part, in so far as it makes the efficacy of P.'s payment to A. depend upon an immaterial fact,<sup>40</sup> which is difficult to ascertain, namely, T.'s knowledge. The final English position seems to be predicated upon the fact that

<sup>38</sup> L. R. 7 Q. B. 598 (1872).

<sup>39</sup> Bowstead, *Agency* (1919 Ed.) § 97.

<sup>40</sup> See criticism by Bramwell, L. J., in *Irvine v. Watson*, L. R. 5 Q. B. D. 414, at page 417 (1880), and decision in *Davison v. Donaldson*, L. R. 9 Q. B. D. 623 (1882), which seem to leave it doubtful whether *Armstrong v. Stokes*, is still good law or not. Cf. article by Mechem, 23 Harv. Law Rev. 520-530.

the agent has been authorized to create a debt of P. to T., and that P. is charged with the duty of seeing that debt discharged. The dicta of *Thomson v. Davenport*, however, view the primary obligation as one owed by A. to T., and hence refuse to impose the extraordinary liability upon P., not a party to the original contract, when such imposition would result in double payment. It is submitted that the latter view is the sounder one, and, while the question has not been frequently considered by the American courts, most cases which have discussed it agree with *Thomson v. Davenport* that payment by P. to A. is always a defense in a suit by T. against P.<sup>41</sup>

#### ACTION BY T. AGAINST P.—DEFENSE OF ELECTION

95. If T. has elected, with full knowledge of P.'s existence and identity, to pursue A., he cannot thereafter pursue P.

Where an agent makes a contract in his own name, without disclosing the fact that he is acting for a principal, the other party, on discovering the principal, may resort to the principal or to the agent, at his election.<sup>42</sup> And the same

<sup>41</sup> *Ketchum v. Verdell*, 42 Ga. 534 (1871); *Thomas v. Atkinson*, 38 Ind. 248 (1871); *LAING v. BUTLER*, 37 Hun, 144, Powell, Cas. Agency, 250 (N. Y. 1885); *Fradley v. Hyland*, 37 Fed. 49, 2 L. R. A. 749 (C. C. 1888); *Montague M. M. Co. v. All-Package, etc., Co., Inc.*, 182 App. Div. 500, 169 N. Y. Supp. 920 (1918); *Price, etc., Co., v. Southern Bell T. & T. Co.*, 19 Ga. App. 264, 91 S. E. 283 (1917). Cf. *Southern Ry. Co. v. Simpkins Co.*, 178 N. C. 273, 100 S. E. 418, 10 A. L. R. 731 (1919). Contra, and in accord with English theory that the primary contract is between T. and the undisclosed P.: *York County Bank v. Stein*, 24 Md. 447 (1866). For a review of the decisions, see 23 Am. Law Rev. 565, and 18 Mich. Law Rev. 343.

<sup>42</sup> *Kingsley v. Davis*, 104 Mass. 178 (1870); *Curtis v. Williamson*, L. R. 10 Q. B. 57 (1874); *Elliott v. Bodine*, 59 N. J. Law, 567, 36 Atl. 1038 (1896); *Yates v. Repetto*, 65 N. J. Law, 294, 47 Atl. 632 (1900).

He cannot divide the claim, and hold each for a part. *Booth v. Barron*, 29 App. Div. 66, 51 N. Y. Supp. 391 (1898).

right of election exists upon discovering the name of the principal, where the name, but not the existence of an agency, is undisclosed at the time the contract is made.<sup>43</sup> When, however, the other party has once, with knowledge of all the facts, elected to hold the agent, he is irrevocably bound by the election, and cannot afterwards resort to the principal.<sup>44</sup> What constitutes an election is a question of fact for the jury, though the evidence of an election may be so conclusive as to preclude any other finding.<sup>45</sup> It has been held in England and Massachusetts that the recovery of judgment against the agent is conclusive evidence of an election to resort to him;<sup>46</sup> but in other jurisdictions it has been held that the principal is not discharged by a judgment without satisfaction of it.<sup>47</sup> Merely bringing suit

<sup>43</sup> *Nelson v. Powell*, 3 Doug. 410, 99 Rep. 723 (1784); *Paterson v. Gandasequi*, 15 East, 62, 104 Rep. 768 (1812); *Thomson v. Davenport*, 9 B. & C. 78, 109 Rep. 30 (1829); *Raymond v. Crown & Eagle Mills*, 43 Mass. (2 Metc.) 319 (1841); *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174 (1880).

<sup>44</sup> *Kingsley v. Davis*, 104 Mass. 178 (1870); *Curtis v. Williamson*, L. R. 10 Q. B. 57 (1874); *Love v. St. Joseph Stock Yards Co.*, 51 Utah, 305, 169 Pac. 951 (1917).

<sup>45</sup> *Calder v. Dobell*, L. R. 6 C. P. 486 (1871); *Curtis v. Williamson*, L. R. 10 Q. B. 57 (1874); *Berry v. Chase*, 179 Fed. 426, 102 C. C. A. 572 (1910).

<sup>46</sup> *Priestly v. Fernie*, 3 H. & C. 977, 159 Rep. 820 (1863). In giving judgment for the defendant on the pleadings in this case, the court obviously overlooked the allegation in the replication that T. did not discover P. until after the entry of judgment against A. See note in 4 Col. Law Rev. 221; *Kingsley v. Davis*, 104 Mass. 178 (1870). See, also, *Kendall v. Hamilton*, L. R. 4 App. Cas. 504, 515 (1879), and *Jones v. Johnson*, 86 Ky. 530, at page 552, 6 S. W. 582 (1888). Cf. *Booth v. Barron*, 29 App. Div. 66, 51 N. Y. Supp. 391 (1898, 4th Dept.), and *O'Grady v. Howe & Rogers Co.*, 166 App. Div. 552, 152 N. Y. Supp. 79 (1915, 4th Dept.). See footnote 47, p. 265, for Second Department case.

<sup>47</sup> *Beymer v. Bonsall*, 79 Pa. 298 (1875). The Beymer Case was approved, and it was held that P. and A. may be sued jointly, in *McLean v. Sexton*, 44 App. Div. 520, 60 N. Y. Supp. 871 (1899, 2d Dept.); *Gay v. Kelley*, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742 (1909). Contra: *Limousine & C. Mfg. Co. v. Shadburne*, 185 Ill. App. 403 (1914). Cf. *Ewing v. Hayward*, 50 Cal. App. 708, 195 Pac. 970 (1920).

against the principal or the agent<sup>48</sup> or filing a claim against his estate in bankruptcy<sup>49</sup> is not conclusive, though it may, with other facts, be evidence of an election. It seems that the right to hold the principal upon his discovery must be exercised within a reasonable time, or it will be deemed to be waived.<sup>50</sup>

To constitute an election, the other party must have knowledge, not merely of the agency, but as to who is the principal; for, although the other party at the time of the contract knows that he is dealing with an agent, if he does not know whose agent he is, he has not the power of choosing between them, and consequently the same rule applies as if he did not know he was an agent at all. Therefore, under such circumstances, and before discovering who the principal is, he does not make an election by taking the agent's note,<sup>51</sup> or charging the goods to him,<sup>52</sup> or sending a statement made out in his name,<sup>53</sup> or even by prosecuting his claim against the agent to judgment.<sup>54</sup>

<sup>48</sup> Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51 (1877); Ferry v. Moore, 18 Ill. App. 135 (1886); Steele-Smith Grocery Co. v. Potthast, 109 Iowa, 413, 80 N. W. 519 (1899); GAVIN v. DURDEN, ETC., CO., 229 Mass. 576, 118 N. E. 897, Powell, Cas. Agency, 254 (1918). See note 17 Harv. Law Rev. 414.

<sup>49</sup> Curtis v. Williamson, L. R. 10 Q. B. 57 (1874); Dameron v. Quick, 116 Va. 614, 82 S. E. 709 (1914). Cf. Jones v. Johnson, 86 Ky. 530, at page 552, 6 S. W. 582 (1888); Montague M. M. Co. v. All-Package, etc., Co., Inc., 182 App. Div. 500, 169 N. Y. Supp. 920 (1918).

<sup>50</sup> Smethurst v. Mitchell, 1 E. & E. 622, 120 Rep. 1043 (1859). But see Davison v. Donaldson, 9 Q. B. D. 623 (1882).

<sup>51</sup> Penty v. Stanton, 10 Wend. 271, 25 Am. Dec. 558 (N. Y. 1833); PAIGE v. STONE, 51 Mass. (10 Metc.) 160, 43 Am. Dec. 420, Powell, Cas. Agency, 58 (1845); Perkins v. Cady, 111 Mass. 318 (1873); Merrill v. Kenyon, 48 Conn. 314, 40 Am. Rep. 174 (1880); Harper v. Bank, 54 Ohio St. 425, 44 N. E. 97 (1896). In a jurisdiction which regards the acceptance of a note as payment, the acceptance of A's promissory note discharges P.

<sup>52</sup> Estes v. Aaron, 227 Mass. 96, 116 N. E. 392 (1917).

<sup>53</sup> Henderson v. Mayhew, 2 Gill, 393, 41 Am. Dec. 434 (Md. 1844).

<sup>54</sup> Greenburg v. Palmieri, 71 N. J. Law, 83, 58 Atl. 297 (1904); Murphy v. Hutchinson, 93 Miss. 643, 48 South. 178, 21 L. R. A. (N. S.) 785, 17 Ann. Cas. 611 (1908), and comment thereon in 22 Harv. Law

**ACTION BY P. AGAINST T.—GENERAL RULE**

96. The undisclosed principal generally may hold T. to the contract made between A. and T.

The law, having held an undisclosed principal generally liable to T., found little difficulty in accepting the converse, namely, that the undisclosed principal can hold T. to the contract made between A. and T.<sup>55</sup> This analogy found further justification in the elimination of circuity of action. The direct suit by P. against T. took the place of a suit by P. against A. and a suit by A. against T. Thus the courts permitted parol evidence to show who the real principal was, in order to give such real principal a cause of action against T.<sup>56</sup>

Rev. 532; *Auto Parts Co. v. Roberts*, 194 Ill. App. 417 (1915); *GAVIN v. DURDEN, ETC., CO.*, 229 Mass. 576, 118 N. E. 897, Powell, Cas. Agency, 254 (1918); *Georgi v. Texas Co.*, 225 N. Y. 410, 122 N. E. 238 (1919).

<sup>55</sup> *Gurratt v. Cullum*, Bull. N. P. 42 (1710), stated in *Scott v. Surman, Willes*, 400, 125 Rep. 1235 (1742). This is probably the earliest case in which an undisclosed P. recovered against T. on the contract. *Cothay v. Fennell*, 10 B. & C. 671, 109 Rep. 599 (1830); *Taintor v. Prendergast*, 3 Hill, 72, 38 Am. Dec. 618 (N. Y. 1842); *Edwards v. Golding*, 20 Vt. 30 (1847); *New Jersey Steam Nav. Co. v. Bank*, 6 How. 344, 380, 12 L. Ed. 465 (U. S. 1848); *Elkins v. Railroad Co.*, 19 N. H. 337, 51 Am. Dec. 184 (1849); *Huntington v. Knox*, 61 Mass. (7 Cush.) 371 (1855); *Ford v. Williams*, 21 How. 287, 16 L. Ed. 36 (U. S. 1858); *Woodruff v. McGehee*, 30 Ga. 158 (1860); *Ames v. Railroad Co.*, 12 Minn. 413 (Gil. 295) (1867); *Spurr v. Cass*, L. R. 5 Q. B. 656 (1870); *Nicoll v. Burke*, 78 N. Y. 580 (1879); *Baltimore Coal Tar & Mfg. Co. v. Fletcher*, 61 Md. 288 (1883); *Barham v. Bell*, 112 N. C. 131, 16 S. E. 903 (1893); *Foster v. Graham*, 166 Mass. 202, 44 N. E. 129 (1896); *Propeller Towboat Co. v. Western Union Tel. Co.*, 124 Ga. 478, 52 S. E. 766 (1905); *Western Union Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850 (1906); *Navarre H. & I. Co. v. American*

<sup>56</sup> *Darrow v. Horne Prod. Co.*, 57 Fed. 463 (C. C. 1893); *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486 (1898); *Nicholson v. Dover*, 145 N. C. 18, 58 S. E. 444, 13 L. R. A. (N. S.) 167 (1907); *CHILD v. CONSTRUCTION CO.*, 42 Utah, 120, 129 Pac. 356, Powell, Cas. Agency, 258 (1912); *Davis v. Reynolds*, 154 Ark. 101, 241 S. W. 379 (1922).

## ACTION BY P. AGAINST T.—EXCEPTIONS TO LIABILITY

97. An undisclosed principal generally cannot sue T.:
- (1) On a sealed instrument signed by A. and T.
  - (2) On a negotiable instrument payable to A.
  - (3) Where P. has furnished only a part of the goods sold by A. to T. under an entire contract, where the consideration is unapportionable.
  - (4) Where T. has negatived his willingness to contract with P.
  - (5) Where the character, skill, or personality of A. is an essential part of the performance expected by T., and the contract is unexecuted.

However, there are some exceptions to this right of the undisclosed principal. As we might expect, an undisclosed principal is not allowed to sue T. on a sealed instrument,<sup>57</sup> or a negotiable instrument,<sup>58</sup> in a case where T. could not

Appraisal Co., 156 App. Div. 795, 142 N. Y. Supp. 89 (1913); KELLY A. B. CO. v. BARBER A. P. CO., 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256, Powell, Cas. Agency, 255 (1914); Willis v. Willis, 33 Idaho, 353, 194 Pac. 470 (1920).

Although the agent stipulates that he will not assign the contract, the undisclosed principal may sue on it. Pritchard v. Budd, 76 Fed. 710, 22 C. C. A. 504 (1896).

<sup>57</sup> Schack v. Anthony, 1 M. & S. 573, 105 Rep. 214 (1813); Berkeley v. Hardy, 8 D. & R. 102 (1826); Spencer v. Field, 10 Wend. 87 (N. Y. 1833); Schaefer v. Henkel, 75 N. Y. 378 (1878); Elliott v. Brady, 192 N. Y. 221, 85 N. E. 69, 18 L. R. A. (N. S.) 600, 127 Am. St. Rep. 898 (1908).

<sup>58</sup> Grist v. Backhouse, 20 N. C. 496 (1839). Otherwise, if note is not negotiable. National Life Insurance Co. v. Allen, 116 Mass. 398 (1874). Cf. Fuller v. Hooper, 69 Mass. (3 Gray) 334 (1855).

An apparent exception to the rule requiring the party to be named or described exists where the payee or indorsee is intended to be a bank, or, according to some decisions, another corporation, which is described by the name and title of its cashier, or managing officer, as "A. B., Cashier," or "A. B., President"; such designation being deemed equivalent to the designation of the bank or corporation. In such case the bank or corporation may sue. Commercial Bank

have sued P. thereon.<sup>59</sup> In addition to these two exceptions, there are three others: If P. has furnished only a part of the goods sold by A. to T. under an entire contract for a lump sum, the consideration being unapportionable, P. cannot sue T.<sup>60</sup> If T. has negatived his willingness to make a contract with a given individual, then such individual cannot come forward as the undisclosed principal and compel T. to complete the contract with him.<sup>61</sup> The converse of this proposition is not true, however. The exception is for the benefit of T., and if T., after discovering the undesired person is really A.'s undisclosed principal, desires to force such undisclosed principal to go through with the contract, he may do so.<sup>62</sup>

Where the nature of the contract is such that the personality of the ostensible principal is or may be of importance, as where his character, skill, or solvency is an essential element of the performance contemplated, it is, of course, clear that the law cannot confer upon the undisclosed principal the right to perform.<sup>63</sup> Yet, even in

v. French, 38 Mass. (21 Pick.) 486, 32 Am. Dec. 280 (1839); Baldwin v. Bank, 1 Wall. 234, 17 L. Ed. 534 (U. S. 1863); First National Bank v. Hall, 44 N. Y. 395, 4 Am. Rep. 698 (1871).

<sup>59</sup> See section 93, *supra*.

<sup>60</sup> Roosevelt v. Doherty, 129 Mass. 301, 37 Am. Rep. 356 (1880).

Cf. St. Louis, K. C. & N. Ry. Co. v. Thacher, 13 Kan. 564 (1874); Talcott v. Railroad Co., 159 N. Y. 461, 54 N. E. 1 (1899).

<sup>61</sup> Humble v. Hunter, 12 Q. B. 310, 116 Rep. 885 (1848); Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93 (1867); Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9 (1877); King v. Batterson, 13 R. I. 117, 43 Am. Rep. 13 (1880); Moore v. Vulcanite P. C. Co., 121 App. Div. 667, 106 N. Y. Supp. 393, affirmed 204 N. Y. 680, 98 N. E. 1108 (1907); Coast Fisheries Co. v. Linen Thread Co., 269 Fed. 841 (D. C. 1921).

Cf. Hawkins v. Windhorst, 87 Kan. 176, 123 Pac. 761 (1912); KELLY A. B. CO. v. BARBER A. P. CO., 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256, Powell, Cas. Agency, 255 (1914); Ritch v. Robinson, 93 Conn. 459, 106 Atl. 509, 7 A. L. R. 81 (1919).

<sup>62</sup> Kayton v. Barnett, 116 N. Y. 625, 23 N. E. 24 (1889).

<sup>63</sup> Kelly v. Thuey, 102 Mo. 522, 15 S. W. 62 (1890). But see *Id.*, 143 Mo. 422, 45 S. W. 301 (1897), which held facts of this case did not bring it within rule. Cowan v. Curran, 216 Ill. 598, 75 N. E.

such case, if the contract is made solely with the ostensible principal to the exclusion of any other principal, and if the facts surrounding the making of the contract are not such as to show an intention to deal with the ostensible principal exclusively, after the contract has been performed according to its terms, the undisclosed principal may maintain an action upon it to recover the price or otherwise to enforce performance of the other party's part of the contract.<sup>64</sup>

#### ACTION BY P. AGAINST T.—DEFENSES

98. T. may successfully interpose as against P. any defense which existed in his favor against the agent at the time when T. first learned that A. was acting for some one, and also any payments made to A. after such discovery, when A. had either authority or power to collect for P.

In suits brought by an undisclosed principal against T., defenses based upon payments by T. to A. must be carefully distinguished from defenses based upon offsets claimed by T. against A. It would be clearly unfair to allow P. to recover against T., without allowing T. at least some of the defenses which would have been available to T., if sued by A. It may therefore be laid down as a general rule that, in an action by the undisclosed principal, the other party to the contract may successfully interpose all equities or defenses which existed in his favor against the agent

322 (1905); Birmingham, etc., Club v. McCarty, 152 Ala. 571, 44 South. 642, 13 L. R. A. (N. S.) 156, 15 Ann. Cas. 237 (1907); Pan-coast v. Dinsmore, 105 Me. 471, 75 Atl. 43, 134 Am. St. Rep. 582 (1909); SHIELDS v. COYNE, 148 Iowa, 313, 127 N. W. 63, 29 L. R. A. (N. S.) 472, Ann. Cas. 1912C, 905, Powell, Cas. Agency, 266 (1910).

<sup>64</sup> Grojan v. Wade, 2 Stark. 443 (1818); Warder v. White, 14 Ill. App. 50 (1883); Sullivan v. Shailor, 70 Conn. 733, 40 Atl. 1054 (1898); Wiehle v. Safford, 27 Misc. Rep. 562, 58 N. Y. Supp. 298 (1899).

at the time when the existence of the agency was first discovered by T.<sup>65</sup> A payment made by T. to A.,<sup>66</sup> or a set-off acquired against A.,<sup>67</sup> at any time before T. has notice that A. is acting for some one else, is a good defense to a suit subsequently brought by P. After T. has ceased to believe that A. is the real principal, T. cannot acquire a set-off or defense against A., and successfully interpose it as a bar when sued by P.<sup>68</sup> However, a payment made by

<sup>65</sup> *Burnham v. Eyre*, 123 App. Div. 777, 108 N. Y. Supp. 452, affirmed 196 N. Y. 560, 90 N. E. 1156 (1909); *Eldridge v. Finnegan*, 25 Okl. 28, 105 Pac. 334, 28 L. R. A. (N. S.) 227 (1909); *Lane v. Leiter*, 237 Fed. 149, 150 C. C. A. 295 (1916).

<sup>66</sup> *Traub v. Milliken*, 57 Me. 63, 2 Am. Rep. 14 (1869); *Rosser v. Darden*, 82 Ga. 219, 7 S. E. 919, 14 Am. St. Rep. 152 (1888).

<sup>67</sup> *Rabone v. Williams*, 7 T. R. 360. Note a, 101 Rep. 1020 (1785); *George v. Clagett*, 7 T. R. 359, 101 Rep. 1019 (1797); *Carr v. Hinchcliff*, 7 D. & R. 42 (1825); *Gardner v. Allen's Ex'rs*, 6 Ala. 187, 41 Am. Dec. 45 (1844); *Ex parte Dixon*, L. R. 4 Ch. D. 133 (1876); *Spurr v. Cass*, L. R. 5 Q. B. 656 (1870); *Frame v. Coal Co.*, 97 Pa. 309 (1881); *MONTAGU v. FORWOOD*, [1893] 2 Q. B. 350, Powell, Cas. Agency, 402; *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211, 72 Am. St. Rep. 631 (1898); *BELFIELD v. NATIONAL SUPPLY CO.*, 189 Pa. 189, 42 Atl. 131, 69 Am. St. Rep. 799, Powell, Cas. Agency, 269 (1899); *Wiser v. Mining Co.*, 94 Ill. App. 471 (1900); *Pollacek v. Scholl*, 51 App. Div. 319, 64 N. Y. Supp. 979 (1900); *Deane v. American Glue Co.*, 200 Mass. 459, 86 N. E. 890 (1907); *Winslow v. Staton*, 150 N. C. 264, 63 S. E. 950 (1909); *Kent v. De Coppet*, 149 App. Div. 589, 134 N. Y. Supp. 195 (1912).

Some courts refuse to allow T. a set-off based on his claim against A., unless P. has intrusted the possession of the goods to A. *Baring v. Corrie*, 2 B. & Ald. 137, 106 Rep. 317 (1818); *Bernshouse v. Abbott*, 45 N. J. Law, 531, 46 Am. Rep. 789 (1883).

Where T. held A.'s note at time A. sold his undisclosed P.'s goods to T., T. was allowed to set off the note, although it did not mature until after T. knew that A. had acted for another. *Hogan v. Shorb*, 24 Wend. 458 (N. Y. 1840). Contra: *Kennedy v. Turnbull*, 15 New Bruns. 378 (1874).

Where A. owed T., and T. made executory contract for purchase of merchandise from A., acting as agent for undisclosed P., and T. learned P.'s identity, and thereafter received the merchandise, T. has no set-off. *McLachlin v. Brett*, 105 N. Y. 391, 12 N. E. 17 (1887).

<sup>68</sup> *Dresser v. Norwood*, 17 C. B. (N. S.) 466, 144 Rep. 188 (1864); *Wright v. Cabot*, 89 N. Y. 570 (1882); *Mildred v. Maspons*, 8 App. Cas. 874 (1883).

"The appellants with commendable candor admit that they are

T. to A. may be a good defense, although made after T. knows there is some principal, and even after T. knows the identity of A.'s principal.<sup>69</sup> The validity of such payment depends upon the question whether the agent has the authority or the power to collect the money due.<sup>70</sup> Under these rules T. is not necessarily precluded from acquiring a set-off by having merely the means of knowledge as to the existence of an undisclosed principal;<sup>71</sup> but, if circumstances are brought to his knowledge which render the character of the principal equivocal, he is put upon inquiry to ascertain in what character the other acts, and, if he makes no inquiry, T. is charged with notice of the agency.<sup>72</sup>

unable to say that they believed the brokers to be principals." Cooke v. Eshelby, 12 App. Cas. 271, at page 275 (1887).

Thus, where T. buys from A., knowing the existence, but not the identity, of the principal, no set-off of a claim against A. is allowed. *Fish v. Kempton*, 7 C. B. 687, 137 Rep. 272 (1849); *Semenza v. Brinsley*, 18 C. B. (N. S.) 467, 144 Rep. 526 (1865).

Cf. *Ilsley v. Merriam*, 61 Mass. (7 Cush.) 242, 54 Am. Dec. 721 (1851).

<sup>69</sup> *Morris v. Cleasby*, 1 M. & S. 576, at page 579, 105 Rep. 215 (1813); *Gardiner v. Davis*, 2 C. & P. 49 (1825); *Weigell v. Gregg*, 161 Wis. 413, 154 N. W. 645, L. R. A. 1916B, 856 (1915).

<sup>70</sup> See section 28, *supra*, and *Warder v. White*, 14 Ill. App. 50 (1883).

If P. has notified T. to deal directly with P., of course, a payment made thereafter to A. will be no defense as against P. *Pitts v. Mower*, 18 Me. 361, 36 Am. Dec. 727 (1841); *Henderson, Hull & Co. v. McNally*, 48 App. Div. 134, 62 N. Y. Supp. 582 (1900); *Rice & Bullen Malting Co. v. Bank*, 185 Ill. 422, 56 N. E. 1062 (1900).

<sup>71</sup> *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38 (1873); *PRATT v. COLLINS*, 20 Hun, 126, Powell, Cas. Agency, 270 (N. Y. 1880).

<sup>72</sup> *Miller v. Lea*, 35 Md. 396, 406, 6 Am. Dec. 417 (1871); Cooke v. Eshelby, 12 App. Cas. 271 (1887); *Baxter v. Sherman*, 73 Minn. 436, 76 N. W. 211, 72 Am. St. Rep. 631 (1898); *Mull v. Ingalls*, 30 Misc. Rep. 80, 62 N. Y. Supp. 830 (1899); *Frazier v. Poindexter*, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33, 8 Ann. Cas. 552 (1906).

Cf. *Scaling v. Knollin*, 94 Ill. App. 443 (1900).

**ACTION BY T. AGAINST A.—GENERAL RULE**

99. T. may sue the agent who has acted for an undisclosed P., and, by the weight of authority, T. may sue the agent who has acted for an unnamed P.

The rights and liabilities of the undisclosed principal and the third person as against each other are purely supplementary to, and in no case eliminate, the rights of A. and the third person as parties who have contracted with each other. Thus the third person may successfully maintain suit against the agent of an undisclosed principal,<sup>73</sup> and this right is not lost or diminished by a discovery of the existence or of the identity of the principal after the contract was made.<sup>74</sup> So, also, if, when the contract was negotiated T. knew A. represented some principal, but did not know the identity of the principal, the weight of authority, including the courts of New York, permits T. to hold A. in

<sup>73</sup> Simon v. Metivier, 1 W. Bl. 599, 96 Rep. 34 (1766); McComb v. Wright, 4 Johns. Ch. 659 (N. Y. 1820); Davenport v. Riley, 2 McCord, 198 (S. C. 1822); Royce v. Allen, 28 Vt. 234 (1856); McClellan v. Parker, 27 Mo. 162 (1858); Wheeler v. Reed, 36 Ill. 82 (1864); PIERCE v. JOHNSON, 34 Conn. 274, Powell, Cas. Agency, 274 (1867); Beymer v. Bonsall, 79 Pa. 298 (1875); Mackey v. Briggs, 16 Colo. 143, 26 Pac. 131 (1891); Brigham v. Herrick, 173 Mass. 460, 53 N. E. 906 (1899); Fritz v. Kennedy, 119 Iowa, 628, 93 N. W. 603 (1903); Alexander, etc., Co. v. McGeehan, 124 Wis. 325, 102 N. W. 571 (1905); Siler v. Perkins, 126 Tenn. 380, 149 S. W. 1060, 47 L. R. A. (N. S.) 232 (1912). See, also, cases in footnote 42, p. 264, *supra*.

It has been held that A. is liable to T. for torts committed by servants hired by A. for the undisclosed P. Cockran v. Rice, 26 S. D. 393, 128 N. W. 583, Ann. Cas. 1913B, 570 (1910), and comment thereon in 11 Col. Law Rev. 175.

This is probably unsound, as A.'s principal is really the entrepreneur, who should be liable in such case. Cf. Yarslowitz v. Bienenstock, 130 N. Y. Supp. 931, affirmed 141 App. Div. 64, 125 N. Y. Supp. 649 (1910), and comment thereon in 25 Harv. Law Rev. 183.

<sup>74</sup> Brigham v. Herrick, 173 Mass. 460, 53 N. E. 906 (1899); Lull v. Anamosa Nat. Bank, 110 Iowa, 537, 81 N. W. 784 (1900).

this case;<sup>75</sup> but some courts hold that T. cannot sue A. personally.<sup>76</sup> If, when the contract was negotiated, T. actually knew, although from some other source, that A. was acting as the agent of P., although the contract is, in form, between A. and T., A. is not liable to T.<sup>77</sup> Some very difficult questions are presented by the form of the contract. It is necessary to decide whether the form of the contract makes it one of disclosed principal, unnamed principal, or undisclosed principal. The cases upon this question are discussed subsequently.<sup>78</sup> If the contract was originally one on behalf of an undisclosed principal, the agent is not relieved of his liability to T. by T. entering upon performance after discovery of the identity of P.,<sup>79</sup> nor by any other act of T. which does not amount to an election to hold P. solely.<sup>80</sup>

<sup>75</sup> Jones v. Littledale, 6 Ad. & E. 486, 112 Rep. 186 (1837); Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51 (1877); Ye Seng Co. v. Corbitt, 9 Fed. 423 (D. C. 1881); Argersinger v. Macnaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687 (1889); Brown v. Ames, 59 Minn. 476, 61 N. W. 448 (1894); McClure v. Trust Co., 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153 (1900); Scaling v. Knollin, 94 Ill. App. 443 (1900); Lull v. Anamosa Nat. Bank, 110 Iowa, 537, 81 N. W. 784 (1900); De Remer v. Brown, 165 N. Y. 410, 59 N. E. 129 (1901); Frank v. Woodcock, 72 Or. 446, 143 Pac. 1105 (1914); Inter. Agric. Corp. v. Carpenter, 180 App. Div. 871, 168 N. Y. Supp. 484 (1917); Solomon v. N. J. Indemnity Co., 94 N. J. Law, 318, 110 Atl. 813 (1920) affirmed 95 N. J. Law, 545, 113 Atl. 927 (1921). See note, 33 Harv. Law Rev. 591.

<sup>76</sup> See Southwell v. Bowditch, L. R. 1 C. P. D. 374 (1876); Pike, Sons & Co. v. Ongley & Thornton, 18 Q. B. D. 708 (1887); Great Lakes Towing Co. v. Worthington et al., 147 Fed. 926 (D. C. 1906), and comment thereon in 5 Mich. Law Rev. 370.

<sup>77</sup> Chase v. Debolt, 7 Ill. (2 Gilman) 371 (1845); Boston & M. R. v. Whitcher, 83 Mass. (1 Allen) 497 (1861); Warren v. Dickson, 27 Ill. 115 (1862); Johnson v. Armstrong, 83 Tex. 325, 18 S. W. 594, 29 Am. St. Rep. 648 (1892).

Cf. Williamson v. Barton, 7 H. & N. 899, 158 Rep. 733 (1862); Worthington v. Cowles, 112 Mass. 30 (1873).

<sup>78</sup> See *infra*, §§ 118-128.

<sup>79</sup> Forney v. Shipp, 49 N. C. 527 (1857); Whiting v. Saunders, 23 Misc. Rep. 332, 51 N. Y. Supp. 211 (1898).

<sup>80</sup> Hutchinson v. Wheeler, 85 Mass. (3 Allen) 577 (1862).

**ACTION BY T. AGAINST A.—DEFENSES**

100. When sued by T., A. may successfully defend by showing:

- (1) That T. has elected to pursue P.
- (2) That P. has paid T.

If T. clearly elects to hold either P. or A., he cannot thereafter hold the other.<sup>81</sup> The question of election is one of fact.<sup>82</sup> Thus, if T. knew that A. represented a certain person, and notwithstanding this knowledge chose to make the agent his debtor, and to deal with him and him alone, T. could not thereafter charge the principal. He has made his election at a time when he had the power of choosing between the two. The mere fact that the other party, with knowledge of the real principal, enters into a contract in writing which purports to be the personal contract of the agent seems not to be conclusive,<sup>83</sup> although the contrary has been held.<sup>84</sup> On the other hand, when a sale is made to one who is acting as agent for the purchaser, who is known to the vendor, and only the note or other personal obligation of the agent is taken in payment of the price, this makes a *prima facie* case that credit is given to the agent alone.<sup>85</sup> Clearly no power of choice exists until T. knows, both the existence and the identity of the princi-

<sup>81</sup> Codd Co. v. Parker, 97 Md. 319, 55 Atl. 623 (1903).

<sup>82</sup> Calder v. Dobell, L. R. 6 C. P. 486 (1871); Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314 (1883).

<sup>83</sup> Calder v. Dobell, L. R. 6 C. P. 486 (1871); Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314 (1883). See Moline Malleable Iron Co. v. Iron Co., 83 Fed. 66, 27 C. C. A. 442 (1897).

<sup>84</sup> Chandler v. Coe, 54 N. H. 561 (1874).

<sup>85</sup> PAIGE v. STONE, 51 Mass. (10 Metc.) 160, 43 Am. Dec. 420, Powell, Cas. Agency, 58 (1845); Coleman v. Bank, 53 N. Y. 388 (1873); Henry Ames Packing & Provision Co. v. Tucker, 8 Mo. App. 95 (1879); Merrell v. Witherby, 120 Ala. 418, 23 South. 994, 26 South. 974, 74 Am. St. Rep. 39 (1898). Contra: Atlas S. S. Co. v. Land Co., 102 Fed. 358, 42 C. C. A. 398 (1900).

pal.<sup>86</sup> What conduct is generally regarded as constituting an election has been discussed.<sup>87</sup>

Clearly, in a suit by T. against A., A. would be allowed to set up as a defense any payments made by P. to T.; but it seems that set-offs existing in favor of P. as against T. cannot be used by A. as offsets to T.'s claim against him.<sup>88</sup>

#### ACTION BY A. AGAINST T.—GENERAL RULE

101. The agent, who has acted for an undisclosed P. may sue T. upon the contract. This right is generally subservient to P.'s rights, and, when enforced, the measure of damages is the same as if P. were the plaintiff.

So, also, the agent for an originally undisclosed principal may maintain suit on the contract against T.<sup>89</sup> This right of A. is, of course, subservient to the right of his principal, and can be terminated by P. at any time before or after commencement of suit,<sup>90</sup> unless the agent's authority is

<sup>86</sup> Raymond v. Crown & Eagle Mills, 43 Mass. (2 Metc.) 319 (1841); Steele-Smith Grocery Co. v. Potthast, 109 Iowa, 413, 80 N. W. 519 (1890); Brown v. Reiman, 48 App. Div. 295, 62 N. Y. Supp. 663 (1900).

<sup>87</sup> *Supra*, § 95.

<sup>88</sup> Forney v. Shipp, 49 N. C. 527 (1857).

<sup>89</sup> Joseph v. Knox, 3 Camp. 320 (1813); Alsop v. Caines, 10 Johns. 396 (N. Y. 1813); Gardiner v. Davis, 2 C. & P. 49 (1825); Colburn v. Phillips, 79 Mass. (13 Gray) 64 (1859); Sharp v. Jones, 18 Ind. 314, 81 Am. Dec. 359 (1862); United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519 (1868); Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. 835 (1887); SHELBY v. BURROW, 76 Ark. 558, 89 S. W. 464, 1 L. R. A. (N. S.) 303, 6 Ann. Cas. 554; Powell, Cas. Agency, 278 (1905); Camp v. Barber, 87 Vt. 235, 88 Atl. 812, Ann. Cas. 1917A, 451 (1913); HOLLISTON v. ERNSTON, 124 Minn. 49, 144 N. W. 415, Powell, Cas. Agency, 275 (1913).

<sup>90</sup> Sadler v. Leigh, 4 Camp. 195 (1815); Dickenson v. Naul, 4 B. & Ad. 638, 110 Rep. 596 (1833); Warder v. White, 14 Ill. App. 50 (1883). An assignment for the benefit of creditors on the part of the principal works a revocation of the agency and terminates the agent's right of action. Miller v. Bank, 57 Minn. 319, 59 N. W. 309 (1894).

for some reason nonterminable.<sup>91</sup> This right of A. is exclusive in the cases where the undisclosed principal cannot sue T.<sup>92</sup> In all cases where the contract is between A. and T., the agent's promise is sufficient consideration for T.'s promise to him personally. It is immaterial that the beneficial interest is in the principal, and that the agent, when he recovers, will be bound to account to him. Thus, an agent who sells goods for an undisclosed principal may recover the price;<sup>93</sup> or an agent who consigns goods, taking a bill of lading or otherwise contracting in his own name, may sue for nondelivery or other breach of the contract.<sup>94</sup> "There is privity of contract," said Lord Ellenborough, "established between these parties by means of the bill of lading. \* \* \* To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable. \* \* \* He cannot say to the shippers they have no interest in the goods, and are not damaged by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner."<sup>95</sup> Even where the principal, with the acquiescence of the broker who had contracted in his own name to purchase goods, refused to have anything to do with them, the contract nevertheless remaining enforceable against them, it was held that the broker, having con-

<sup>91</sup> See sections 88 and 89, supra; also *Hudson v. Granger*, 5 B. & Ald. 27, 106 Rep. 1103 (1821).

<sup>92</sup> See section 97, supra.

<sup>93</sup> *Alsop v. Caines*, 10 Johns. 396 (N. Y. 1813); *Gardiner v. Davis*, 2 C. & P. 49 (1825).

<sup>94</sup> *Joseph v. Knox*, 3 Camp. 320 (1813); *Dunlop v. Lambert*, 6 Cl. & F. 600, 7 Rep. 824 (1839); *Blanchard v. Page*, 74 Mass. (8 Gray) 281 (1857); *Finn v. Railroad Corp.*, 112 Mass. 524, 17 Am. Rep. 128 (1874); *Carter v. Railway Co.*, 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354 (1900).

Where an agent sent the proceeds of sale to the owner by express, he could maintain an action against the express company for loss of the money. *Snider v. Express Co.*, 77 Mo. 523 (1883).

<sup>95</sup> *Joseph v. Knox*, 3 Camp. 320 (1813).

tracted personally, could recover damages against the seller for nondelivery.<sup>96</sup> When the agent has no beneficial interest in the contract, his right of action does not pass to his assignee in bankruptcy.<sup>97</sup>

The right of the agent to maintain an action is not abolished by the provision of the Codes which provides that every action must be prosecuted in the name of "the real party in interest," since an exception is created in favor of "the trustee of an express trust," and "a person with whom, or in whose name, a contract is made for the benefit of another," is declared to be such trustee, within the meaning of the term.<sup>98</sup>

The measure of damages in a suit by the agent is the same as in a suit by the principal, since the plaintiff will hold the amount recovered in trust for the latter.<sup>99</sup>

#### ACTION BY A. AGAINST T.—DEFENSES

102. When sued by A., T. may successfully defend:

- (1) By showing payment to P.
- (2) By establishing set-off, good against P., where equitable defenses are allowed.
- (3) By showing a defense good against A. individually.

Since the right of the principal to sue is superior, the defendant may in a suit by the agent avail himself of any

<sup>96</sup> Short v. Spackman, 2 B. & Ad. 962, 109 Rep. 1400 (1831).

<sup>97</sup> Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332 (1871).

<sup>98</sup> Considerant v. Brisbane, 22 N. Y. 389 (1860); Snider v. Express Co., 77 Mo. 523 (1883); Cremer v. Wimmer, 40 Minn. 511, 42 N. W. 467 (1889); Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099 (1893).

This rule is applicable in the federal courts held within the Code states. Albany & R. Iron & Steel Co. v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982 (1887). Cf. Ward v. Ryba, 58 Kan. 741, 51 Pac. 223 (1897).

<sup>99</sup> Joseph v. Knox, 3 Camp. 320 (1813); U. S. Tel. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519 (1868); Evrit v. Bancroft, 22 Ohio St. 172 (1871); Groover v. Warfield, 50 Ga. 644 (1874); Sargent v. Donahue, 94 Vt. 271, 110 Atl. 442 (1920).

defense, in law or equity, which would have been good against the principal. Thus, a settlement with the principal is a good defense.<sup>1</sup> Under the statute of set-offs it has been held that the defendant cannot set off a debt due from the principal;<sup>2</sup> but the contrary is held wherever equitable defenses to legal actions are permitted.<sup>3</sup> If, on the other hand, the agent by reason of a lien, as against the principal, upon the subject-matter, has a superior right to sue, a settlement with the principal is not a defense, when such settlement would prejudice the agent's claim,<sup>4</sup> unless the defendant was led by the terms or conditions of the contract, or by the conduct of the agent, to believe that the agent acquiesced in a settlement with the principal.<sup>5</sup>

The defendant is also entitled to any defense which would be good against the plaintiff on the record, although it would not be good against the principal suing in his own name.<sup>6</sup> Thus, where an insurance broker sued on a policy effected in his name, payment to him by allowing him credit for premiums due from him to defendants, although it would not have constituted payment as between the insurers and the assured, was held a defense. "The plaintiff," said Denman, C. J., "though he sues as trustee of another, must, in a court of law, be treated in all respects as the party in the cause; if there is a defense against him, there is a defense against the cestui que trust who uses his name, and the plaintiff cannot be permitted to say for the benefit of another that his own act is void, which he cannot say for the benefit of himself."<sup>7</sup>

<sup>1</sup> Atkinson v. Cotesworth, 3 B. & C. 647, 107 Rep. 873 (1825).

<sup>2</sup> Alsop v. Caines, 10 Johns. 396 (N. Y. 1813); Isberg v. Bowden, 8 Ex. 852, 155 Rep. 1599 (1853); Bierce v. State Nat. Bank, 25 Okl. 44, 105 Pac. 195 (1909), and comment thereon in 10 Col. Law Rev. 259.

<sup>3</sup> Hayden v. Bank, 29 Ill. App. 458 (1888); Bliss v. Sneath, 103 Cal. 43, 36 Pac. 1029 (1894).

<sup>4</sup> Robinson v. Rutter, 4 El. & B. 954, 119 Rep. 355 (1855).

<sup>5</sup> Grice v. Kenrick, L. R. 5 Q. B. 340 (1870).

<sup>6</sup> Gibson v. Winter, 5 B. & Ad. 96, 110 Rep. 728 (1833).

<sup>7</sup> Gibson v. Winter, 5 B. & Ad. 96, 110 Rep. 728 (1833).

## CHAPTER XIII

### OTHER RIGHTS OF PRINCIPAL AND THIRD PERSON INTER SESE

- 103. Scope of Chapter.  
Statement by Agent—
- 104. Admissibility as Admission.
- 105. Inadmissible to Establish Agency.
- 106. Admissibility as Part of Res Gestæ.  
Notice to Agent—
- 107. Function.
- 108. General Rule.
- 109. Acquired in Other Transactions.
- 110. Exceptions to Imputation.
- 111. Notice to Subagent.
- 112. Collusion Between A. and T.  
Recovery of P.'s Property from T.—
- 113. Quasi Contract.
- 114. Replevin and Trover.
- 115. Exceptions.
- 116. Following Trust Funds.
- 117. Recovery by P. from T. for Loss of Services of A.

### SCOPE OF CHAPTER

103. This chapter covers topics previously undiscussed which alter—
- (1) T.'s claims as against P.
  - (2) The claims of either T. or P. as against the other.
  - (3) P.'s claims as against T.

The purpose of this chapter is to treat those topics in the law of agency, not heretofore discussed, which alter the legal relations between the principal and third persons. These matters fall into three general groups: First, those which chiefly affect T.'s claims as against P., such as the admissions of A.;<sup>1</sup> second, those which may alter the claims of either T. or P. as against the other, such as the

<sup>1</sup> See sections 104–106, infra.

binding force on P. of notice to A.;<sup>2</sup> and, third, those which deal with the claims of P. against T., such as the right of P. against T. to recover property wrongfully delivered to T. by A.<sup>3</sup>

#### STATEMENT BY AGENT—ADMISSIBILITY AS ADMISSION

104. A statement by an agent is evidence against his principal as an admission, when made by the agent as a part of a transaction as to which the agent had either the authority or the power to bind the principal.

Admissions either of a party or his agent are generally utilized to impose liability upon the person who, personally or by agent, has made the admission. Thus they generally alter T.'s claims against P. It is beyond the scope of this book to give a detailed treatment to this subject, as most of such treatment would be an invasion of the law of evidence.<sup>4</sup> There are some matters which are part of the substantive law of agency. These will be treated.

An admission is a statement, by words or conduct, as to a fact material to the issue, inconsistent with the present contention of the alleged admirer.<sup>5</sup> The admission of a party to an action is always admissible against him. The admission of a party's agent is admissible against the principal, if within the scope of the agent's authority. This scope is determined by the considerations heretofore discussed and found to control the authority and power of an agent to impose contract liability upon his principal.<sup>6</sup> Admissions by agents must be distinguished from statements by agents which are themselves the very facts to be

<sup>2</sup> See sections 107–112, *infra*.

<sup>3</sup> See sections 113–117, *infra*.

<sup>4</sup> Wigmore, *Evidence* (1923 Ed.) §§ 1048–1087.

<sup>5</sup> Wigmore, *Evidence* (1923 Ed.) § 1048.

<sup>6</sup> See chapters II, III, and IV, *supra*.

proved. An admission is merely a substitute for other proof, or an additional means of proving the fact of which it is a statement, and which may be otherwise proved.

In order that the statement of an agent may be evidence against the principal as an admission, the relation of principal and agent must first be proved. It is not enough, however, to show that the relation existed when the statement was made. It must appear that the agent was acting as such in making the statement. Of course, if it could be shown that the speaker had authority to make that particular statement, the proof would be sufficient. And, if A. refers B. to C. for information upon a particular matter, C.'s statements respecting such matter are evidence against A.,<sup>7</sup> the agency being for the purpose of making statements. In other cases it must appear that the statement was made while the agent was engaged in transacting some authorized business for his principal, and had reference to, and was connected with, that business, so as to be a part of the pending transaction.<sup>8</sup>

It is commonly said that the statement must be made while the agent is engaged in transacting some authorized business, and must be so connected with it as to constitute part of the *res gestæ*.<sup>9</sup> But "the Latin phrase adds

<sup>7</sup> Williams v. Innes, 1 Camp. 364 (1808); Hood v. Reeve, 3 Car. & P. 532 (1828); Chapman v. Twitchell, 37 Me. 59, 58 Am. Dec. 773 (1853); Oliver v. Huckins, 244 S. W. 625 (Tex. Civ. App. 1922).

It must appear that the reference was for that purpose. Proctor v. Railroad Co., 154 Mass. 251, 28 N. E. 13. See McKelvey, Ev. 103.

<sup>8</sup> Fairlie v. Hastings, 10 Ves. Jr. 123, 32 Rep. 791 (1804); UNITED STATES v. GOODING, 25 U. S. (12 Wheat.) 460, 6 L. Ed. 693, Powell, Cas. Agency, 280 (1827); Garth v. Howard, 8 Bing. 452, 131 Rep. 468 (1832); Fogg v. Pew, 76 Mass. (10 Gray) 409, 71 Am. Dec. 662 (1858); Northwestern Union Packet Co. v. Clough, 87 U. S. (20 Wall.) 528, 22 L. Ed. 406 (1874); White v. Miller, 71 N. Y. 118 at 134, 27 Am. Rep. 13 (1877); McPherrin v. Jennings, 66 Iowa, 622, 24 N. W. 242 (1885); Loving v. Mutual Life Ins. Co., 140 Md. 173, 117 Atl. 323 (1922).

<sup>9</sup> UNITED STATES v. GOODING, 25 U. S. (12 Wheat.) 460, 6 L. Ed. 693, Powell, Cas. Agency, 280 (1827); Northwestern Union Packet Co. v. Clough, 87 U. S. (20 Wall.) 528, 22 L. Ed. 406 (1874); White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13 (1877).

nothing"; it is used here as an equivalent expression for the business on hand, or the pending transaction, as regards which for certain purposes the law identifies the principal and the agent.<sup>10</sup> The use of "res gestæ" in this connection tends to confusion, by reason of its use in connection with declarations which are admissible as a part of the res gestæ, meaning thereby the surrounding circumstances or circumstantial facts, where no question of agency is necessarily involved.<sup>11</sup>

Provided the requirement that the statement be made as part of a pending transaction, as explained, be fulfilled, the nature of the transaction is immaterial, and the admission may be of a present or of a past fact. While the statement of an agent in negotiating a contract may constitute the agreement of the principal, or an inducement to the contract, and thus form the basis of an action upon the contract or for deceit, a statement made by the agent in the negotiation in regard to the subject-matter may also be used against the principal as an admission in an action not based upon the contract or the statement.<sup>12</sup> Thus, in an action upon a statute to recover a penalty for selling coals short measure, it was held that what the defendant's agent, who made the sale, said bearing upon that issue, in respect to the sale about to take place and in respect to the coals which were the subject of the sale, was evidence against the defendant.<sup>13</sup>

The question of the agent's power to bind his principal by an admission is usually raised when the statement concerns a past fact. An agent, as such, has not power to make admissions, even in respect to a transaction in which

<sup>10</sup> Thayer, 15 Am. Law. Rev. 80.

<sup>11</sup> BLACKMAN v. WEST JERSEY & S. R. CO., 68 N. J. Law, 1, 52 Atl. 370, Powell, Cas. Agency, 282 (1902); Thayer, Cas. on Ev. 630; Wigmore, Ev. (1904 Ed.) § 1797.

<sup>12</sup> Peto v. Hague, 5 Esp. 134 (1804); UNITED STATES v. GOODING, 25 U. S. (12 Wheat.) 460, 6 L. Ed. 693, Powell, Cas. Agency, 280 (1827).

<sup>13</sup> Peto v. Hague, 5 Esp. 134 (1804).

he was himself concerned;<sup>14</sup> yet if, in the course of his employment, it becomes his duty or he has authority to deal with a person who asserts,<sup>15</sup> or against whom his principal asserts,<sup>16</sup> rights based upon a past transaction, or to answer questions,<sup>17</sup> or to make statements to any person about it,<sup>18</sup> what he then says while acting within the scope of his authority concerning it is evidence against his principal. On this ground the acknowledgment of an indebtedness, upon demand for payment, made by an agent who is the proper person from whom to demand payment is evidence against the principal as an admission of the debt,<sup>19</sup> and may be used against him to take the case out of the statute of limitations.<sup>20</sup> So, in an action against a railway

<sup>14</sup> *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13 (1877); *Phelps v. James*, 86 Iowa, 398, 53 N. W. 274, 41 Am. St. Rep. 497 (1892); *Idaho Forwarding Co. v. Insurance Co.*, 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586 (1892). See, also, cases cited footnote 38, p. 291, *infra*. *Spencer v. Duluth Auto Supply Co.*, 191 N. W. 39 (Minn. 1922).

<sup>15</sup> See cases cited in footnotes 19-21, pp. 284, 285, *infra*.

<sup>16</sup> Where an attorney is retained, not only to sue a railroad company for damages caused by an accident, but also to present the plaintiff's claim and obtain settlement without suit, if possible, a letter written by his clerk, under his directions, to the company, stating what purported to be the facts in the case, in response to an inquiry by the company, is admissible in evidence for the company. *Loomis v. Railroad Co.*, 159 Mass. 39, 34 N. E. 82 (1893). The admission of an attorney is not receivable, unless made with reference to a matter in which he had authority to represent his client. *Treadaway v. Railroad Co.*, 40 Iowa, 526 (1875); *Pickert v. Hair*, 146 Mass. 1, 15 N. E. 79 (1888); *Fletcher v. Railway Co.*, 109 Mich. 363, 67 N. W. 330 (1896).

As to the power of an attorney to make admissions in the conduct of a suit, see *Perry v. Manufacturing Co.*, 40 Conn. 313, 317 (1873); *Marsh v. Mitchell*, 26 N. J. Eq. 497, 500 (1875); *Haas v. Society*, 80 Ill. 248 (1875). See *ante*, § 33.

<sup>17</sup> *Morse v. Railroad Co.*, 72 Mass. (6 Gray) 450 (1856).

<sup>18</sup> *Kirkstall Brewery Co. v. Furness Ry. Co.*, L. R. 9 Q. B. 468 (1874).

<sup>19</sup> *Clifford v. Burton*, 1 Bing. 199, 130 Rep. 81 (1823), offer of compromise upon application for payment.

<sup>20</sup> *Palethorp v. Furnish*, 2 Esp. 511, note (1783); *Burt v. Palmer*, 5 Esp. 145 (1804); *Anderson v. Sanderson*, 2 Stark. 204; *Id.*, Holt, N. P. 591 (1817).

company for the loss of a trunk, the declaration of the company's station master, made the next morning after the loss in accounting for the trunk to the plaintiff, was admissible; it being part of his duty to deliver the baggage of passengers and to account for the same, provided inquiries were made within a reasonable time.<sup>21</sup> And similarly where a parcel was lost in transit, and the station master, in the ordinary course of his duty, made a statement to the police as to the absconding of a porter suspected to have taken it, with a view to his apprehension, the statement was held admissible against the company on the issue whether the parcel was stolen by one of its servants.<sup>22</sup> On the other hand, in an action against a railway company for non-delivery of cattle within a reasonable time, the statement of a night inspector at a station, through which the trucks which carried the cattle would pass, made a week after the alleged occurrence, in answer to a question why he had not sent on the cattle, that he had forgotten them, was held inadmissible, on the ground that he had not authority to make admissions relative to bygone transactions.<sup>23</sup> This case is distinguishable from the preceding case upon the ground that it was not part of the duty of the night inspector to render an account of the affair to the plaintiff in answer to his inquiries. So, where the plaintiff was injured by a fall from the gangway while attempting to go on board the defendant's steamboat, and afterwards during the voyage the captain admitted to her that it was through the carelessness of the hands in putting out the plank that she fell, it was held error to permit the admission to be received.<sup>24</sup>

<sup>21</sup> Morse v. Railroad Co., 72 Mass. (6 Gray) 450 (1856); Burnside v. Railway Co., 47 N. H. 554, 93 Am. Dec. 474 (1867). See, also, Lane v. Railroad Co., 112 Mass. 455 (1873).

<sup>22</sup> Kirkstall Brewery Co. v. Furness Ry. Co., L. R. 9 Q. B. 468 (1874).

<sup>23</sup> Great Western Ry. v. Willis, 18 C. B. (N. S.) 748, 144 Rep. 639 (1865).

<sup>24</sup> Northwestern Union Packet Co. v. Clough, 87 U. S. (20 Wall.) 528, 22 L. Ed. 406 (1874).

**STATEMENT BY AGENT—INADMISSIBLE TO ESTABLISH AGENCY**

**105. No evidence of the words or conduct of an agent is admissible as proof of the fact of agency, without proof of the principal's knowledge and acquiescence.**

It follows from what has been said that neither the existence of the agency nor its extent can be proved by the admission of the agent.<sup>25</sup> His power to make admissions rests upon the very fact that he is agent, and has authority to make the statement which constitutes the admission. To receive his statement as an admission of that authority would be to proceed in a circle. He is, however, competent as witness to testify to the fact and terms of his appointment, if it was not conferred by writing.<sup>26</sup> Neither is it competent to prove the extent of his authority by his acts, when the effect of such proof would be only to show his assertion of the powers assumed.<sup>27</sup> Such proof is in-

<sup>25</sup> MUSSEY v. BEECHER, 57 Mass. (3 Cush.) 511; Powell, Cas. Agency, 40 (1849); Howe Mach. Co. v. Clark, 15 Kan. 492 (1875); Sax v. Davis, 71 Iowa, 406, 32 N. W. 403 (1887); Bohanan v. Railroad, 70 N. H. 526, 49 Atl. 103 (1900); Blair-Baker Horse Co. v. First Nat. Bank, 164 Ind. 77, 72 N. E. 1027 (1904); Eagle Iron Co. v. Baugh, 147 Ala. 613, 41 South. 663 (1906); Kroll v. Philadelphia, 240 Pa. 131, 87 Atl. 292 (1913); Ennis v. Wright, 217 Mass. 40, 104 N. E. 430 (1914); Oxweld, etc., Co. v. Hughes, 126 Md. 437, 95 Atl. 45, L. R. A. 1916B, 751, Ann. Cas. 1917C, 837 (1915); Washington, etc., Co. v. Elliott, 91 Conn. 350, 100 Atl. 29 (1917); Gutterson v. Dilley, 201 Mich. 579, 167 N. W. 865 (1918); Texas Co. v. Quelquejeu, 263 Fed. 491 (C. C. A. 1920). See, also, footnote 36, § 17, p. 49. supra.

Admissions of an agent are not evidence without proof of agency, but the former may be admitted before proof of the latter. First Unitarian Soc. v. Faulkner, 91 U. S. 415, 23 L. Ed. 283 (1875).

<sup>26</sup> Gould v. Lead Co., 63 Mass. (9 Cush.) 338, 57 Am. Dec. 50 (1852); Howe Mach. Co. v. Clark, 15 Kan. 492 (1875); Thayer v. Meeker, 86 Ill. 470 (1877); Roberts v. Insurance Co., 90 Wis. 210, 62 N. W. 1049 (1895), though agent is husband of principal.

<sup>27</sup> Graves v. Horton, 38 Minn. 66, 35 N. W. 568 (1887); Leu v.

admissible, except to show a course of dealing acquiesced in by the principal, from which authority or power to do other similar acts might be implied.

### STATEMENT BY AGENT—ADMISSIBILITY AS PART OF RES GESTÆ

106. A statement by an agent is evidence for or against his principal, if it constitutes a part of the res gestæ.

The cases very commonly confuse a situation in which testimony is offered as to an agent's admission and one in which a declaration of the agent made at the time of the transaction is offered as a part of the res gestæ. The admissibility of the evidence in one case depends upon the scope of the agent's authority, and in the other upon conformity to the well-known exception to the exclusion of hearsay evidence.

Every act or event is set about by surrounding circumstances, or circumstantial facts, which "may consist of declarations made at the time by participants in the act, or other acts done, of the position, condition, and appearance of inanimate objects, and of other elements which serve to illustrate the main act or event."<sup>28</sup> Subject to not very well defined limitations, such circumstances may be proved as part of the thing done—the res gesta, or, as it is commonly put, the res gestæ. Such declarations comprise statements, exclamations, and other utterances by the participants in the act. They are received on the ground of their spontaneity. "They are the extempore utterances of the mind under circumstances and at times when there has been no sufficient opportunity to plan false or misleading

Mayer, 52 Kan. 419, 34 Pac. 969 (1893); Merchants' Nat. Bank v. Nichols & Co., 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752 (1906); Aerne v. Gostlow, 60 Or. 113, 118 Pac. 277 (1911); Anderson v. Patten, 157 Iowa, 23, 137 N. W. 1050 (1912); McDonald v. Strawn, 78 Okl. 271, 190 Pac. 558 (1920).

<sup>28</sup> McKelvey, Ev. (1924 Ed.) p. 406.

statements; they exhibit the mind's impressions of immediate events, and are not narrative of past happenings."<sup>29</sup> Such declarations constitute an exception to the hearsay rule. To be admissible, they must be made while the act is being done or the event happening, or so soon thereafter that the mind of the declarant is actively influenced by it. The cases are not in accord as to the extent of the time which the *res gestæ* cover; and, indeed, the time necessarily depends more or less upon the circumstances of each case. The question always is whether the declaration is a spontaneous utterance or the mere narrative of a past act. When such declarations are admitted, they are generally made within a few minutes of the act or event to which they relate.<sup>30</sup>

The application of this rule, or rather exception to the hearsay rule, frequently arises in accident cases, where the declaration of the person whose act caused the injury is sought to be introduced as tending to show his negligence, or otherwise throwing light upon the nature of the act. Where one of the participants in the act is a servant or agent, there appears no reason for applying a different rule to his declaration, if part of the *res gestæ*, than to the declaration of any other person. If an act which causes injury to a third person, the plaintiff, is committed by a servant of the defendant in the course of his employment, so as to be in law the act of the defendant, the act, with all its surrounding circumstances, or *res gestæ*, may be proved, and the declaration of any servant who participated in the act, if part of the *res gestæ*, is admissible against the

<sup>29</sup> McKelvey, Ev. (1924 Ed.) p. 407.

See exposition of this exception to hearsay rule in Wigmore, Ev. (1923 Ed.) § 1766 ff.

<sup>30</sup> Lund v. Inhabitants of Tyngsborough, 63 Mass. (9 Cush.) 36, 42 (1851); Travelers' Ins. Co. v. Mosley, 75 U. S. (8 Wall.) 397, 19 L. Ed. 437 (1869); Waldele v. Railroad Co., 95 N. Y. 274, 47 Am. Rep. 41 (1884); Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299 (1886); Standard Oil Co. v. Douglass, 18 Ala. App. 625, 93 South. 286 (1922).

defendant.<sup>31</sup> The admissibility of the declaration, although made by a servant, does not depend upon his power to bind his master by his admissions, but upon its being part of the res gestæ. If a declaration is admissible as part of the res gestæ, it is competent, no matter by whom made.<sup>32</sup> Upon the same ground a declaration of the party injured may be admissible in his own favor.<sup>33</sup>

It must be conceded that the admissibility of declarations of servants and agents, whose admissibility rests upon the ground that they are part of the res gestæ, in its proper sense, is often treated as depending upon the power of an agent to bind his principal by his admissions. "Where the acts of the agent will bind the principal," it is said, "there

<sup>31</sup> Hanover R. Co. v. Coyle, 55 Pa. 396 (1867); Cleveland v. New-som, 45 Mich. 62, 7 N. W. 222 (1880); O'Connor v. Railway Co., 27 Minn. 166, 6 N. W. 481, 38 Am. Rep. 288 (1880); Marion v. Railway Co., 64 Iowa, 568, 21 N. W. 86 (1884); Hermes v. Railway Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69 (1891); Ohio & M. Ry. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733 (1892); Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720, 852, 38 Am. St. Rep. 290 (1893).

<sup>32</sup> Where a brakeman on a flat car received an injury in a collision between such car and a detached portion of the train while making a running switch, and two minutes after, while he was still on the car, the engineer walked a car length from the engine to where the brakeman was, declarations by the engineer as to the cause of the accident, which did not refer to acts done or matters happening before the collision, were admissible against the company as part of the res gestæ. "Counsel argue," said Elliott, C. J., " \* \* \* that the declarations admitted in that case [Louisville, N. A. & C. Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883 (1889)], were those of the injured person, while the declarations admitted in this instance were those of the agent or servant. A complete and effective answer to this argument is that, if the declarations were \* \* \* part of the res gestæ, they were competent, no matter by whom they were made." Ohio & M. Ry. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733 (1892).

<sup>33</sup> Louisville, N. A. & C. Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883 (1889).

Cf. Travelers' Ins. Co. v. Mosley, 75 U. S. (8 Wall.) 397, 19 L. Ed 437 (1869).

his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting a part of the *res gestæ*.<sup>34</sup> It is believed, however, that a distinction should be drawn.<sup>35</sup> On the one hand, declarations made at the time of the act by the parties participating therein and part of the *res gestæ*—that is, of the surrounding circumstances—are admissible, irrespective of whether the participants are servants of the person sought to be held responsible for the act, and by whomsoever made. On the other hand, the statement of a servant or agent is admissible as an admission, if it is made when he is engaged in some authorized transaction, and it is within the scope of his authority in that transaction to make the statement. To illustrate: In an action against a railway company, by a person injured by a collision, the declaration of the engineer, referring directly to and characterizing or explaining the occurrence, made at the time or immediately afterwards, under its immediate influence, may, under the circumstances of the case, be held part of the *res gestæ*, and admissible against the company upon that ground.<sup>36</sup> It might be, however, that some subsequent statement of the engineer as to the cause of the accident, although not part of the *res gestæ*, would be evidence against the company as an admission, as, for example, if it happened to be made by him in the course of his duty in making a report of the accident to a superior officer.<sup>37</sup> In the one case the declaration of the

<sup>34</sup> Story, Ag. § 134, frequently quoted in this connection. See cases cited footnote 31, p. 289, *supra*.

<sup>35</sup> See Thayer, Cas. on Ev. 630; Wigmore, Ev. (1904 Ed.) § 1797.

<sup>36</sup> Ohio & M. Ry. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 531, 19 L. R. A. 733 (1892).

<sup>37</sup> Keyser v. Railway Co., 66 Mich. 390, 33 N. W. 867 (1887); Texas & P. Ry. Co. v. Lester, 75 Tex. 56, 12 S. W. 955 (1889); Meyer v. Insurance Co., 104 Cal. 381, 38 Pac. 82 (1894).

Cf. North Hudson Co. R. Co. v. May, 48 N. J. Law, 401, 5 Atl. 276 (1886).

It has been held that letters of an agent to his principal, in which

engineer is admissible as a circumstantial fact, as part of the *res gestæ*, because it is the spontaneous utterance of a participant in the event. In the other case his statement is admissible against the company as an admission, because it is made at a time and under circumstances when the engineer has authority to make it. If the statement is not admissible, either as a declaration forming part of the *res gestæ*, or as an admission, it cannot be received.<sup>38</sup>

#### NOTICE TO AGENT—FUNCTION

107. Notice to an agent, or knowledge possessed by an agent, may extinguish P.'s claim against T., or may base or enlarge T.'s claim against P.

While admissions and declarations of an agent thus function to alter T.'s claims against P., notice to an agent, or knowledge possessed by an agent, may either alter T.'s claims against P. or change P.'s claims against T. Thus, if a manufacturer of charged drinks is held chargeable with the notice, possessed by his agents who did the work, that bottles have been improperly charged, the third person injured by the explosion of one of these bottles has a good claim against the manufacturer.<sup>39</sup> The imputed knowledge has deprived P. of a defense. Conversely, the imputed knowledge may confer a defense on T. Thus, where an agent appointed to collect money learned that his prin-

he renders an account of his transactions, are not admissible, as being mere narration. *Langhorn v. Allnutt*, 4 *Taunt.* 511, 128 *Rep.* 429. (1812); *United States v. The Burdett*, 34 U. S. (9 Pet.) 682, 689, 9 *L. Ed.* 273 (1835). Contra: *The Solway*, 10 *Prob. Div.* 137, 54 *Law J. Prob.* 83 (1885).

<sup>38</sup> *Luby v. Railroad Co.*, 17 N. Y. 131 (1858); *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 7 *Sup. Ct.* 118, 30 *L. Ed.* 299 (1886); *Durkee v. Railroad Co.*, 69 Cal. 533, 11 *Pac.* 130, 58 *Am. Rep.* 562 (1886); *Williamson v. Railroad Co.*, 144 Mass. 148, 10 N. E. 790 (1887); *Sokolof v. Dunn*, 194 N. Y. Supp. 580 (Sup. 1922).

<sup>39</sup> *Colyar v. Little Rock B. Wks.*, 114 Ark. 140, 169 S. W. 810 (1914).

pal's name had been forged to a check sent by the debtor, and that this check had been cashed by the T. Bank, and no notice was given to the bank of these facts during the time when the bank had in its possession sufficient assets of the forger to reimburse itself, the knowledge of the agent, imputed to the principal, based an equitable estoppel in favor of the bank, which barred the principal's suit against the bank on the check.<sup>40</sup> Thus notice to an agent may extinguish P.'s claim against T., or may base or enlarge T.'s claim against P. It is therefore important to ascertain when notice to an agent will be regarded as notice to his principal.

#### NOTICE TO AGENT—GENERAL RULE

108. When, in the course of his employment, the agent acquires knowledge, or receives notice, of any fact material to the business in which he is employed, the principal generally is deemed to have notice of such fact.

In business dealings, the rights and obligations of one person may be affected by the knowledge or notice which he may have of the adverse rights or equities of persons other than the one with whom he deals, or of other facts which, because known to him, give a different character to his act; and if he deals through an agent, his rights and obligations are, as a rule, equally affected by knowledge or notice of any such matter which comes to the agent in the course of the business in which he is employed. Notice to the agent is notice to the principal, if it is acquired in the very transaction in which he is then employed.<sup>41</sup> It is

<sup>40</sup> *Brown v. People's Nat. Bank*, 170 Mich. 416, 136 N. W. 506, 40 L. R. A. (N. S.) 657 (1912).

<sup>41</sup> *Le Neve v. Le Neve*, 1 Ves. Sr. 64, 27 Rep. 893 (1747); *Hiern v. Mill*, 13 Ves. 114, 33 Rep. 237 (1806); *The DISTILLED SPIRITS*, 78 U. S. (11 Wall.) 356, 20 L. Ed. 167, Powell, Cas. Agency, 283 (1870); *Suit v. Woodhall*, 113 Mass. 391 (1873); *Macomb v. Wilkin-*

commonly said that the general rule that a principal is bound by the knowledge of his agent is based on the principle that it is the agent's duty to communicate the knowledge which he has respecting the subject-matter of the agency, and the presumption that he will do his duty;<sup>42</sup> but this reason, like many others assigned for the identification of principal and agent, is somewhat artificial. Within certain limits, it is reasonable and just to impute the knowledge of the agent to the principal, and to the extent of imputing notice of what the agent learns or receives notice of in the same transaction the courts are agreed.<sup>43</sup> If

son, 83 Mich. 486, 47 N. W. 336 (1890); *Bawden v. London, E. & G. Assur. Co.*, [1892] 2 Q. B. 534; *Prescott v. Le Conte*, 83 App. Div. 482, 82 N. Y. Supp. 411, aff'd 178 N. Y. 585, 70 N. E. 1108 (1904); *N. Y., N. H. & H. R. Co. v. Russell*, 83 Conn. 581, 78 Atl. 324 (1910); *Hains v. P. M. & I. R. Co.*, 75 W. Va. 613, 84 S. E. 923 (1915); *Corrigan v. Bobbs-Merrill Co.*, 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662 (1920); *Drilling v. N. Y. Life Ins. Co.*, 234 N. Y. 234, 137 N. E. 314 (1922).

A purchaser of land is chargeable with notice of all equities of which his agent has learned in the course of the transaction. *Schreckhise v. Wiseman*, 102 Va. 9, 45 S. E. 745 (1903); *Johnson v. Tribby*, 27 App. D. C. 281 (1906); *St. John v. Fowler*, 183 App. Div. 698, 170 N. Y. Supp. 606 (1918); *Kentucky R. C. Corp. v. Sumner*, 195 Ky. 119, 241 S. W. 820 (1922).

Cf. *Schanz v. Sotscheck*, 167 App. Div. 202, 152 N. Y. Supp. 851 (1915).

So, also, as to a purchaser of a negotiable instrument. *Childers v. Billiter*, 144 Ky. 53, 137 S. W. 795 (1911).

Such notice starts the statute of limitations running, where knowledge of damage is prerequisite. *Poirier v. Burton, etc., Co.*, 127 La. 936, 54 South. 292 (1911).

So an agent's knowledge that the use of a way is permissive will prevent the principal acquiring a right by adverse possession. *Daw v. Lally*, 213 Mass. 578, 100 N. E. 1024 (1913).

See 7 Mich. Law Rev. 113, for a very complete collection of cases down to 1908, made by Professor Mechem.

<sup>42</sup> The DISTILLED SPIRITS, 78 U. S. (11 Wall.) 356, 20 L. Ed. 167, Powell, Cas. Agency, 2S3 (1870); Interstate, etc., Bk. v. Yates, etc., Bk., 245 Fed. 294, 157 C. C. A. 486 (1917); Cal. Civil Code (1915 Ed.) § 2332.

Cf. *Hall & Brown W. M. Co. v. Haley, etc., Co.*, 174 Ala. 190, 56 South. 726, L. R. A. 1918B, 924 (1911).

<sup>43</sup> The principal is not allowed to controvert the fact of notice.

the agent fails to complete the transaction, and it is taken up and completed by a second agent, notice of a material fact, which comes to the knowledge of the first agent while acting for the principal, will not be imputed to him.<sup>44</sup>

The rule applies only to knowledge of facts which are material in the business for which the agent is employed. To affect the principal with notice, the matter known to the agent must be something within the scope of his agency; that is, in reference to which he has authority to act, or which it is his duty in the capacity in which he is employed to communicate.<sup>45</sup> "As it is the rule that whether

*Pringle v. Mod. Woodmen of Amer.*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231 (1906); *Cleveland, etc., Co. v. Moore*, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540 (1907).

<sup>44</sup> "By some it is held that the rule rests upon the principle of the legal identity of the principal and agent. By others it is placed upon the ground that, when a principal has consummated a transaction in whole or in part through an agent, it is contrary to equity and good conscience that he should be permitted to avail himself of the benefits of his agent's participation without becoming responsible as well for his agent's knowledge as for his agent's acts. \* \* \* The latter, in our opinion, is the more reasonable and equitable foundation of the rule, and gives it a more salutary operation. Such being, in our opinion, the proper ground, \* \* \* we think the knowledge of Moore should not be imputed to Irvine." Per Gaines, J., in *Irvine v. Grady*, 85 Tex. 120, 19 S. W. 1028 (1892).

If A. acquired knowledge of a given fact while acting for P. in one matter, P.'s constructive knowledge of that fact does not affect P.'s rights in a different and distinct deal. *Blackburn v. Vigors*, L. R. 12 App. Cas. 531 (1887).

Cf. *Blackburn v. Haslam*, L. R. 21 Q. B. D. 144 (1888) and cases in footnote 58, p. 298, *infra*.

<sup>45</sup> *Tate v. Hyslop*, L. R. 15 Q. B. D. 368 (1885); *Trentor v. Pothen*, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225 (1891); *Hickman v. Green*, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39 (1894); *Pennoyer v. Willis*, 26 Or. 1, 36 Pac. 568, 46 Am. St. Rep. 594 (1894); *Strauch v. May*, 80 Minn. 343, 83 N. W. 156 (1900); *Bohanan v. Railroad Co.*, 70 N. H. 526, 49 Atl. 103 (1900); *Topliff v. Shadwell*, 68 Kan. 317, 74 Pac. 1120 (1904), text approved and applied; *Hockfield v. R. R. Co.*, 150 N. C. 419, 64 S. E. 181, 134 Am. St. Rep. 945 (1909); *Rothchild Bros. v. No. Pac. R. Co.*, 68 Wash. 527, 123 Pac. 1011, 40 L. R. A. (N. S.) 773 (1912); *Lane v.*

the principal is bound by the contracts entered into by the agent depends upon the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend upon the same conditions. Hence, in order to determine whether the knowledge of the agent should be imputed to the principal, it becomes of primary importance to ascertain the exact extent and scope of the agency.”<sup>46</sup> The test to be applied does not look to rank or title, but to the duties assigned, and the authority and obligation which went with that assignment.<sup>47</sup>

#### NOTICE TO AGENT—ACQUIRED IN OTHER TRANSACTIONS

109. Different rules prevail in different jurisdictions as to whether the doctrine of imputed notice extends to knowledge acquired by the agent while acting in a different transaction:
- (a) In some jurisdictions, the rule of imputed notice is strictly confined to facts of which the agent acquires knowledge, or receives notice, in the particular transaction in which he is then employed.

United Electric Lt. & Water Co., 88 Conn. 670, 92 Atl. 430 (1914), text approved and applied.

“Where the employment of the agent is such that in respect to the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is correct.” Per Lord Halsbury in *Blackburn v. Vigors*, L. R. 12 App. Cas. 531, 537 (1887).

<sup>46</sup> *Trentor v. Pothen*, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225 (1891).

In this case it was held that when an attorney was employed to examine an abstract of title, and to give an opinion as to the sufficiency of the title, it was not within the scope of the agency to go beyond the record evidences of title, and that consequently the client was not charged with notice of an adverse claim not disclosed by the record, which had come to the knowledge of the attorney while engaged in another transaction for another client.

<sup>47</sup> Prentice, C. J., in *Lane v. United Electric Lt. & Water Co.*, 88 Conn. 670, 92 Atl. 430 (1914). See, also, *Northwestern R. Co. v. Hardy*, 160 Wis. 324, 151 N. W. 791 (1915).

- (b) In most jurisdictions, the rule prevails that knowledge of a fact material to the business in which the agent is employed, if actually present in his mind during the agency and while acting on the principal's behalf, although acquired by him in another transaction and while acting for another principal, generally is deemed notice to the principal.

Whether the doctrine of imputed notice may be extended to knowledge acquired by the agent in a previous or different transaction is a question upon which there is a conflict of authority. The danger of extending the rule of imputed notice has always been recognized. The courts were averse to extending it to knowledge acquired in another transaction, for, it was urged, this would make the man of greatest practice and greatest eminence the most dangerous to employ.<sup>48</sup>

(a) By this earlier view, which formerly prevailed in England,<sup>49</sup> and which still prevails in some jurisdictions in this country,<sup>50</sup> it was held that the rule could not be extended so far as to affect the principal by knowledge acquired by the agent in another transaction and at another time. The agent "cannot stand in the place of the principal," it was said, "until the relation of principal and agent is constituted, and as to all information previously acquired the principal is a mere stranger."<sup>51</sup> "Notice to him [the

<sup>48</sup> Worsley v. Earl of Scarborough, 3 Atk. 392, 26 Rep. 1025 (1746).

<sup>49</sup> Warrick v. Warrick, 3 Atk. 291, 26 Rep. 970 (1745); Worsley v. Earl of Scarborough, 3 Atk. 392, 26 Rep. 1025 (1746).

<sup>50</sup> HOUSEMAN v. ASSOCIATION, 81 Pa. 256, Powell, Cas. Agency, 286 (1876); Barbour v. Wiehle, 116 Pa. 308, 9 Atl. 520 (1887); Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S. W. 1057 (1895); Lightcap v. Nicola, 34 Pa. Super. Ct. 189 (1907); Hall & Brown W. M. Co. v. Haley, etc., Co., 174 Ala. 190, 56 South. 726, L. R. A. 1918B, 924 (1911); Mann v. United Motor B. Co., 226 Mass. 495, 116 N. E. 239 (1917).

<sup>51</sup> Mountford v. Scott, 3 Madd. 34, Per Leach, V. C. 56 Rep. 422 (1818).

agent] twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be.”<sup>52</sup>

(b) At an early day the extreme technicality of the then prevailing view was recognized, and Lord Eldon declared, as dictum, that he should be unwilling to say “that, if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances.”<sup>53</sup> In England the view seems now to be established that knowledge of an agent acquired previous to the agency, but actually present in his mind during the agency and while acting for his principal, and material to the business delegated, will, as respects such transaction or matter, be deemed notice to the principal.<sup>54</sup> This view has been approved by the Supreme Court of the United States,<sup>55</sup> and is the view more generally prevailing.<sup>56</sup> It must be established by the person asserting notice that the knowledge was present in the agent’s mind,<sup>57</sup> although the burden would

<sup>52</sup> HOUSEMAN v. ASSOCIATION, 81 Pa. 256, Powell, Cas. Agency, 286 (1876).

<sup>53</sup> Per Lord Eldon, in Mountford v. Scott, 1 Turn. & R. 274, 37 Rep. 1105 (1823).

<sup>54</sup> Dresser v. Norwood, 17 C. B. (N. S.) 466, 144 Rep. 188 (1864).

<sup>55</sup> The DISTILLED SPIRITS, 78 U. S. (11 Wall.) 356, 20 L. Ed. 167, Powell, Cas. Agency, 283 (1870).

<sup>56</sup> Union Bank v. Campbell, 23 Tenn. (4 Humph.) 394 (1843); Chouteau v. Allen, 70 Mo. 290 (1879); Shafer v. Ins. Co., 53 Wis. 361, 10 N. W. 381 (1881); Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319 (1881); Lebanon Sav. Bk. v. Hollenbeck, 29 Minn. 322, 13 N. W. 145 (1882); Constant v. University, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769 (1889); Snyder v. Partridge, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130 (1891); Schwind v. Boyce, 94 Md. 510, 51 Atl. 45 (1902); Henry v. Omaha Packing Co., 81 Neb. 237, 115 N. W. 777 (1908); First State Bank v. Bridges, 39 Okl. 355, 135 Pac. 378 (1913); Underwood v. Fosha, 96 Kan. 240, 150 Pac. 571 (1915); Thimsen v. Reigard, 95 Or. 45, 186 Pac. 559 (1920).

<sup>57</sup> Constant v. University, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769 (1889); Equitable Securities Co. v. Shepard, 78 Miss. 217, 28 South. 842 (1900); Gregg v. Baldwin, 9 N.

doubtless be sustained in any case if the information had been acquired so recently as to make it incredible that he should have forgotten it.<sup>58</sup>

Where the agency is continuous, and is concerned with a business made up of a long series of transactions, as where the agent is the cashier of a bank, or otherwise placed in constant management and control of his principal's business, it seems that knowledge acquired or notice received by the agent during the course of the agency, although not acquired or received in the particular transaction which may be in question, will be imputed to the principal, without proof that the agent retained it in his memory.<sup>59</sup> It is important to remember that knowledge acquired by the agent in another transaction is not, like notice acquired in the same transaction, to be imputed to the principal as matter of law; that is, irrespective of whether the agent actually had it in mind while engaged in the pending transaction. It is upon this ground that it is held, even in jurisdictions which extend the rule of imputed notice to knowledge acquired in other transactions, that the principal is not legally chargeable with such knowledge.<sup>60</sup> It must in each case depend upon the circumstances.

D. 515, 84 N. W. 373 (1900); Cooke v. Mesmer, 164 Cal. 332, 128 Pac. 917 (1912); Guaranty Trust Co. v. Koehler, 195 Fed. 669, 115 C. C. A. 475 (1912); Friar v. Rae-Chandler Co., 192 Iowa, 427, 185 N. W. 32 (1921); Chicago Journal Co. v. Industrial Com., 305 Ill. 46, 136 N. E. 697 (1922).

<sup>58</sup> The DISTILLED SPIRITS, 78 U. S. (11 Wall.) 356, 20 L. Ed. 167, Powell, Cas. Agency, 283 (1870); Chouteau v. Allen, 70 Mo. 290 (1879); Brothers v. Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932 (1893); Foote v. Bank, 17 Utah, 283, 54 Pac. 104 (1898); Simpson v. Central Vt. Ry. Co., 95 Vt. 388, 115 Atl. 299 (1921).

<sup>59</sup> It has been so held when the principal is a corporation. Holden v. Bank, 72 N. Y. 286 (1878); Cragle v. Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9 (1885); Brothers v. Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932 (1893).

Cf. Watt v. German S. Bank, 183 Iowa, 346, 165 N. W. 897 (1917).

<sup>60</sup> St. Paul Fire & Marine Ins. Co. v. Parsons, 47 Minn. 352, 50 N. W. 240 (1891); Union Nat. Bank v. Insurance Co., 71 Fed. 473, 18 C. C. A. 203 (1896).

The foregoing rules apply equally to officers and other agents of corporations. Indeed, many of the cases which have been here cited in their support are cases in which notice was imputed to a corporation. When the officer in question is a director, it must be remembered that the directors of a corporation have power to bind it only when acting as a board.<sup>61</sup> It follows that notice to a director, or knowledge acquired or possessed by him individually, and not while acting in his official capacity, as a member of the board, is not to be imputed to the corporation.<sup>62</sup> But if, when so acting, he has actual knowledge of some fact material to the business in hand, the corporation will be affected, subject to the exceptions which apply to other agents, with notice.<sup>63</sup> Notice to a stockholder is not notice to the corporation.<sup>64</sup>

#### NOTICE TO AGENT—EXCEPTIONS TO IMPUTATION

110. In a case in which notice or knowledge possessed by A. would be imputed to P. under the principles of sections 108 and 109, such imputation will not be made—

<sup>61</sup> Clark, Corp. (1916 Ed.) p. 613.

<sup>62</sup> Bank of United States v. Davis, 2 Hill, 451 (N. Y. 1842); Farrel Foundry v. Dart, 26 Conn. 376 (1857); New Haven, M. & W. R. Co. v. Town of Chatham, 42 Conn. 465 (1875); Buttrick v. Railroad Co., 62 N. H. 413, 13 Am. St. Rep. 578 (1882); Watt v. German S. Bank, 183 Iowa, 346, 165 N. W. 897 (1917). See discussions of this topic in 24 Col. Law Rev. 401, 15 Col. Law Rev. 710, and 6 Mich. Law Rev. 431.

Otherwise, if communicated to him as director, for the purpose of being communicated to the board. United States Ins. Co. v. Shriver, 3 Md. Ch. 381 (1851).

<sup>63</sup> Bank of United States v. Davis, 2 Hill, 451 (N. Y. 1842); National Security Bank v. Cushman, 121 Mass. 490 (1877); Innerarity v. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710 (1885). Cf. McKenney v. Ellsworth, 165 Cal. 326, 132 Pac. 75 (1913).

<sup>64</sup> Housatonic Bank v. Martin, 42 Mass. (1 Metc.) 294 (1840).

- (1) If disclosure to P. would be a breach of the agent's duty to his former principal; or
- (2) If the agent is engaged in perpetrating an independent fraud on his own account, or it is intrinsically improbable that he will inform his principal.

Notice will not be imputed to the principal, if the fact of which the agent has knowledge was acquired by the agent confidentially as agent for another principal, under such circumstances that it would be a betrayal of professional confidence and a breach of his duty to the other principal to disclose it.<sup>65</sup>

The principal is not bound by the knowledge of his agent when it would be against the agent's interest to inform him of the facts. Therefore, if the agent is engaged in perpetrating an independent fraud on his own account, knowledge of facts relating to the fraud will not be imputed to the principal.<sup>66</sup> The principal is not bound, it is said, when the character and nature of the agent's knowledge

<sup>65</sup> The DISTILLED SPIRITS, 78 U. S. (11 Wall.) 356, 20 L. Ed. 167, Powell, Cas. Agency, 283 (1870); Constant v. University, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769 (1889).

<sup>66</sup> Nat. Life Ins. Co. v. Minch, 53 N. Y. 144 (1873); Cave v. Cave, L. R. 15 Ch. D. 639 (1880); Innerarity v. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710 (1885); Allen v. Railroad Co., 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185 (1889); Thomson-Houston Electric Co. v. Electric Co., 65 Fed. 341, 12 C. C. A. 643 (1894); Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39 (1894); Henry v. Allen, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658 (1896); Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75 (1897); Amer. Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977 (1897); Benton v. Mfg. Co., 73 Minn. 498, 76 N. W. 265 (1898); Pursley v. Stahley, 122 Ga. 362, 50 S. E. 139 (1905); Merchants' Nat. Bk. v. Nichols & Co., 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752 (1906); Van Buren County v. Surety Co., 137 Iowa, 490, 115 N. W. 24, 126 Am. St. Rep. 290 (1908); Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, 36 Sup. Ct. 676, 60 L. Ed. 1202 (1915); Scott, etc., Co. v. Powers, 112 Miss. 798, 73 South, 792 (1916); Bank of Proctorville v. West, 184 N. C. 220, 114 S. E. 178 (1922).

Actual malice is not to be imputed because of the knowledge of another person, however related. Reisan v. Mott, 42 Minn. 49, 43 N. W. 691, 18 Am. St. Rep. 489 (1889).

make it intrinsically improbable that he will inform his principal.<sup>67</sup> Whether the rule or the exception rest upon a presumption that the agent will or will not communicate the facts to his principal may be doubted.<sup>68</sup> Whatever the reasons for the exception, it is well established.<sup>69</sup> Of course, if the agent is openly acting adversely to his principal, his knowledge will not be imputed to the latter.<sup>70</sup> In such case he is not acting as agent, but on his own behalf.

<sup>67</sup> *Camden Safe D. & T. Co. v. Lord*, 67 N. J. Eq. 489, 58 Atl. 607 (1904); *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320, Ann. Cas. 1918A, 762 (1917); *Citizens' Nat. Bk. v. Good Roads Gravel Co.*, 236 S. W. 153 (Tex. Civ. App. 1922).

<sup>68</sup> "It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by the agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such fraud bears some analogy to a tort willfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master." Per Field, J., in *Allen v. Railroad*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185 (1889). See, also, *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658 (1896).

<sup>69</sup> The United States Supreme Court applies the exception, however, only when the third person was aware of facts showing that the agent was unlikely to communicate his knowledge to P. *Armstrong v. Ashley*, 204 U. S. 272, 27 Sup. Ct. 270, 51 L. Ed. 482 (1907).

<sup>70</sup> *Third Nat. Bank v. Harrison*, 10 Fed. 243, at page 252 (C. C. 1882); *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736 (1886); *First Nat. Bank v. Babbidge*, 160 Mass. 563, 36 N. E. 462 (1894).

The fact that an agent also acts as agent for the party adversely interested in the transaction does not prevent his principal from being bound by notice to or knowledge acquired by such agent where the principal consents to such adverse agency. *PINE MOUNTAIN IRON & COAL CO. v. BAILEY*, 94 Fed. 258, 36 C. C. A. 229, Powell, Cas. Agency, 288 (1899).

### NOTICE TO SUBAGENT

111. On principle, notice to a subagent or knowledge possessed by a subagent should have the same legal consequences as in the case of an agent. Many jurisdictions deny any imputation of notice or knowledge, when the one having the notice or knowledge is an agent of an intermediate independent contractor.

If an agent has authority to employ a subagent, it seems that the same principles must apply as to the notice to be imputed to the principal as in cases of agents appointed by him directly, and that notice to the subagent of any fact material to the business which he is authorized to transact is notice to the principal.<sup>71</sup> This rule is frequently applied in cases of subagents appointed by insurance agents.<sup>72</sup> Nor would it seem to be material, so long as the agent had authority to appoint the subagent, whether privity of contract existed between him and the principal.<sup>73</sup> If the principal is bound by his act, he should also be charged by his knowledge. It has been held, however, by the Supreme Court of the United States, that where a creditor placed an account in the hands of a collecting agency, with instructions to collect, and the agency sent the claim to an attorney at the place of residence of the debtor, who persuaded him to confess judgment, the attorney was the agent of the collecting agency, and not of the creditor, and that his knowledge of the insolvency of the debtor, who

<sup>71</sup> Boyd v. Vanderkemp, 1 Barb. Ch. 273 (N. Y. 1846); MERRITT v. HUBER, 137 Iowa, 135, 114 N. W. 627, Powell, Cas. Agency, 293 (1908).

<sup>72</sup> Carpenter v. Insurance Co., 135 N. Y. 298, 31 N. E. 1015 (1892).

<sup>73</sup> Supra, § 82; text quoted and approved by Walker, J., in Ring Furniture Co. v. Bussell, 171 N. C. 474, 88 S. E. 484 (1916).

The court in this case seemed to hold the subagent was acting for P.'s agent, and not for an independent contractor, and hence that P. was bound by the subagent's knowledge. This involved a considerable stretch of the evidence.

was soon after adjudged a bankrupt, was not chargeable to the creditor, so as to render the judgment a preference.<sup>74</sup> The decision was placed upon the ground that the attorney was the agent of an intermediate, independent contractor.<sup>75</sup> Three members of the court dissented, holding that the attorney was the creditor's agent.<sup>76</sup>

### COLLUSION BETWEEN A. AND T.

112. Collusion between A. and T. may extinguish T.'s claim against P., or may base or enlarge P.'s claim against T.

<sup>74</sup> Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392 (1875). "Neither can it be doubted that, where an agent has power to employ a subagent, the acts of the subagent, or notice given to him in the transaction of the business, have the same effect as if done or received by the principal. \* \* \* For the acts of a subagent the principal is liable, but \* \* \* for the acts of the agent of an intermediate independent employer he is not liable. It is difficult to lay down a precise rule which will define the distinctions arising in such cases. The application of the rule is full of embarrassment. \* \* \* Such attorney is the agent of the collection agent, and not of the creditor who employed that agent." Opinion of the court, per Hunt, J.

Cf. Jaquith v. Davenport, 191 Mass. 415, 78 N. E. 93 (1906).

<sup>75</sup> No. Brit. Mer. Ins. Co. v. Union Stockyards Co., 120 Ky. 465, 87 S. W. 285, 27 Ky. Law Rep. 852 (1905); Pittsburgh, etc., R. Co. v. Templeton, 210 Ill. App. 377 (1918); Colleoni v. Delaware & H. Co., 274 Pa. 319, 118 Atl. 248 (1922).

<sup>76</sup> "The attorney \* \* \* acted for them [the creditors], and was compelled to use their name. \* \* \* I am at a loss to see how their liability is changed by the fact that the notes were sent to him through a commercial or collecting agency. This agency had no interest in the notes; was not liable to the attorney for his fees. \* \* \* The notes were not indorsed to this agency, nor could it in any manner have prevented Wise & Co. from controlling all the proceedings of the attorney for collecting of the money. \* \* \* The effect of the decision is that a nonresident creditor, by sending his claim to a lawyer through some indirect agency, may secure all the advantages of priority and preference which the attorney can obtain of the debtor, well knowing his insolvency, without any responsibility under the bankrupt law." Per Miller, J., dissenting, in Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392 (1875). See comments on this case in Bates v. Mortgage Co., 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340 (1893).

An agent is not allowed to put himself into a position in which his interest and his duty will conflict.<sup>77</sup> If a person who is dealing with a principal through an agent so deals with the agent as to give the agent an interest against the principal, the latter, on discovering the facts, may, at his option, rescind,<sup>78</sup> or he may stand by the contract, and recover from the agent any gratuity, bribe, or benefit which he has received,<sup>79</sup> and in addition to this recover from A. and T. jointly and severally any damages which he has sustained by entering into the contract.<sup>80</sup> Thus a gratuity given, or promise of commission or reward made, to an agent for the purpose of influencing the execution of the agency, vitiates a contract subsequently made by him as being presumptively made under that influence.<sup>81</sup> It is enough that a gratuity is given in order to influence the agent generally, and the contract is voidable, although the gratuity was not given in relation to the particular contract.<sup>82</sup> So, also, if an agent employed to sell sells ostensi-

<sup>77</sup> See *infra*, § 146.

<sup>78</sup> *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189 (1907); *Garlick v. Lake Shore Lumber Co.*, 220 Mich. 179, 189 N. W. 1009 (1922).

See, also, cases in footnotes 81 and 82, p. 304, *infra*.

<sup>79</sup> *Barnsdall v. O'Day*, 134 Fed. 828, 67 C. C. A. 278 (1905) and comment thereon 18 Harv. Law Rev. 617. See, also, cases in footnote 80, p. 304, *infra*.

<sup>80</sup> *Panama Tel. Co. v. India Rubber Co.*, L. R. 10 Ch. App. 515 (1875); *City of Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230 (1890); *MAYOR OF SALFORD v. LEVER*, [1891] 1 Q. B. 168, Powell, Cas. Agency, 294; *Glaspie v. Keator*, 56 Fed. 203, 5 C. C. A. 474 (1893); *City of Findlay v. Pertz*, 66 Fed. 427, 437, 13 C. C. A. 559, 29 L. R. A. 188 (1895).

Cf. *McCourt v. Singers-Bigger*, 145 Fed. 103, 76 C. C. A. 73, 7 Ann. Cas. 287 (1906).

<sup>81</sup> *Panama Tel. Co. v. India Rubber Co.*, L. R. 10 Ch. App. 515 (1875); *United States Rolling Stock Co. v. Railroad Co.*, 34 Ohio St. 450, 32 Am. Rep. 380 (1878); *Young v. Hughes*, 32 N. J. Eq. 372 (1880); *City of Findlay v. Pertz*, 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188 (1895); *Alger v. Keith*, 105 Fed. 105, 44 C. C. A. 371 (1900).

<sup>82</sup> *Smith v. Sorby*, L. R. 3 Q. B. D. 552, note (1875).

Cf. *Marshall v. Sackett & W. Co.*, 181 App. Div. 157, 168 N. Y. Supp. 259 (1917), and comment thereon in 18 Col. Law Rev. 282.

bly to a third person, but really to that third person and himself,<sup>83</sup> or if, in making the sale, the agent withholds information which good faith requires him to communicate to P., and the purchaser is cognizant of the fraud,<sup>84</sup> the sale is voidable at the option of P. If the contract has been fully executed, or if P. so desires, instead of rescinding, P. may sue for damages.

So, where an agent was induced by bribery to enter into a contract, it was held that the principal was entitled, not merely to recover from the agent the amount of the bribe, but in an action against the other party to recover damages for the fraud. "The agent," said Lord Esher, "has been guilty of two distinct and independent frauds—the one in his character of agent; the other by reason of his conspiracy with the third person with whom he has been dealing. Whether the action by the principal against the third person was the first or the second must be wholly immaterial. The third person was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he had received."<sup>85</sup> So, where a member of the water board of a city and a third person combined to purchase, in the name of the latter, land which should afterwards be purchased by the board at an advanced price, and the profits be divided, and the purpose was effected, it was held that both were alike liable for the injury sustained by the city. "The abuse of trust of which the agent is guilty, with

<sup>83</sup> *Ex parte Huth*, Mont. & C. 667 (1840). See, also, *Donovan v. Campion*, 85 Fed. 71, 29 C. C. A. 30 (1898). See section 146, *infra*, and cases in footnote 95, p. 390, therein.

<sup>84</sup> *Hegenmyer v. Marks*, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808 (1887).

<sup>85</sup> *MAYOR OF SALFORD v. LEVER*, [1891] 1 Q. B. 168, at page 176, Powell, Cas. Agency, 294.

Accord: *Barnsdall v. O'Day*, 134 Fed. 828, 67 C. C. A. 278 (1905), and comment thereon in 18 Harv. Law Rev. 617.

his [the other's] knowledge and co-operation," said the court, "is a wrong for which both are liable, as the injury to the principal is the result of their combined action."<sup>86</sup>

### RECOVERY OF P.'S PROPERTY FROM T.—QUASI CONTRACT

113. Where money is paid by an agent to a third person under a mistake of fact, or under such other circumstances that in equity and good conscience he ought not to retain it, the principal may recover it in an action for money had and received.

There are certain principles, not heretofore discussed, which regulate or base claims by P. against persons with whom A. has dealt. In the course of many agencies, money and property belonging to P. come into the hands of A. In case A., either intentionally or by mistake, hands over such money or property of P. to T., contrary to P.'s desires, P. naturally desires to recover his own. To what extent and by what means can this be accomplished?

As a rule, where money is paid by the agent to a third person under such circumstances that it would be unconscionable for him to retain it, the principal may recover it in an action for money had and received.<sup>87</sup> The action is not based upon contract, but upon the ground that the money equitably belongs to the plaintiff, and the obligation is quasi contractual. Upon this principle, money may be recovered when the agent has paid it under a mistake of fact,<sup>88</sup> or it has been illegally exacted from him,<sup>89</sup> or,

<sup>86</sup> City of Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230 (1890); American Realty Co. v. Amey, 121 Me. 545, 118 Atl. 475 (1922).

<sup>87</sup> Clarke v. Shee, 1 Cowp. 197, 98 Rep. 1041 (1774).

<sup>88</sup> United States v. Bartlett, 2 Ware, 17, Fed. Cas. No. 14,532 (1839).

<sup>89</sup> Stevenson v. Mortimer, 2 Cowp. 805, 98 Rep. 1372 (1778). See Demarest v. Barbadoes Tp., 40 N. J. Law, 604 (1878).

where gaming is unlawful, when he has gambled it away or paid it upon a wager.<sup>90</sup>

### RECOVERY OF P.'S PROPERTY FROM T.— REPLEVIN AND TROVER

114. When an agent disposes of the property of his principal to a third person, and in so doing acts beyond the scope of the authority, which as against such person he is deemed to have, the principal generally may maintain an action against such person for the recovery of the property or for conversion.

Since the possession of the agent is the possession of the principal, the latter may, of course, maintain an action for any act of trespass committed by a third person upon his property in the agent's hands,<sup>91</sup> and, if the property is wrongfully converted, may maintain an action for its recovery,<sup>92</sup> or for conversion.<sup>93</sup>

As a rule, no person can transfer to another a better title than he himself possesses. A person, therefore, however innocent, who buys a thing from one not the owner, or receives it in deposit by way of security, obtains, in general, no property in it whatsoever. It makes no difference that the person who assumes to sell or otherwise dispose of the thing is an agent, unless he has authority, real or apparent, to do so. If the disposition of the thing, whether by way of sale,<sup>94</sup> pledge,<sup>95</sup> barter,<sup>96</sup> or otherwise, is not one

<sup>90</sup> Mason v. Walte, 17 Mass. 560 (1822); Burnham v. Fisher, 25 Vt. 514 (1853); Thompson v. Hynds, 15 Utah, 389, 49 Pac. 293 (1897).

<sup>91</sup> Holly v. Huggeford, 25 Mass. (8 Pick.) 73, 19 Am. Dec. 303 (1829).

<sup>92</sup> White v. Dolliver, 113 Mass. 400, 18 Am. Rep. 502 (1873).

<sup>93</sup> Waldo v. Peck, 7 Vt. 434 (1835).

<sup>94</sup> Manning v. Keenan, 73 N. Y. 45 (1878); Levi v. Booth, 58 Md. 308, 42 Am. Rep. 332 (1882); Gilman Linseed Oil Co. v. Norton, 89 Iowa, 434, 56 N. W. 663, 48 Am. St. Rep. 400 (1893); Biggs v. Evans, [1894] 1 Q. B. 88.

<sup>95</sup> Boyson v. Coles, 6 M. & S. 14, 105 Rep. 1148 (1817); Fletcher

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<sup>96</sup> See note 96 on following page.

which, as against the other party, the agent is to be deemed authorized or empowered to make, the owner may maintain an action for recovery of possession or for conversion.

### RECOVERY OF P.'S PROPERTY FROM T.—EXCEPTIONS

115. When an agent pays money or negotiates a negotiable instrument, which is transferable by delivery to a bona fide purchaser for value, the purchaser acquires a good title, notwithstanding the agent's want of authority.

To the general rule, that no person can transfer a better title than he possesses, however, there are some exceptions, several of which are here in point. When any person in the possession of money, although he may have stolen it, pays it for value to a person who has no notice of any defect in his title, the latter acquires a perfect title to it; and by the law merchant bills of exchange, promissory notes, and other negotiable securities, if payable to bearer or indorsed in blank, and hence transferable by delivery, stand upon the same footing, provided they are negotiated to a purchaser for value before maturity.<sup>97</sup> Consequently, when an agent without authority pays money or negotiates such securities belonging to his principal to one who has no notice of the agency, the other conditions being fulfilled, the principal is without remedy against him.<sup>98</sup>

A second and very important exception to P.'s ability to recover his property or damages from T. exists in cases

v. Heath, 7 B. & C. 517, 108 Rep. 815 (1827); Thurber v. Bank, 52 Fed. 513 (C. C. 1892).

<sup>96</sup> Guerreiro v. Peile, 3 B. & A. 616, 106 Rep. 786 (1820); Taylor & Farley Organ Co. v. Starkey, 59 N. H. 142 (1879).

<sup>97</sup> Norton, B. & N. (4th Ed.) 154, 268.

<sup>98</sup> Goodwin v. Robarts, L. R. 1 App. Cas. 476 (1876); London Joint S. Bank v. Simmons, [1892] A. C. 201.

covered by the Factor's Acts. These cases have been discussed.<sup>99</sup>

#### RECOVERY OF P.'S PROPERTY FROM T.—FOLLOWING TRUST FUNDS

116. When an agent misapplies money intrusted to him, or wrongfully converts the property of his principal into some other form, the principal is entitled, as against the agent or any person claiming under him, except a bona fide purchaser, to the proceeds of such money or property, provided they can be identified as such; and, if the agent has mixed the money or property with his own, the principal is entitled, as against the agent or such other person, to a charge upon the mixed fund or mass, or upon the proceeds of the same, provided the original money or property, or the proceeds thereof, can be identified as entering into the fund or property sought to be charged.

When an agent misapplies the property of his principal, the latter may recover it, in whosoever hands it may be, provided he can identify it, unless the circumstances create an estoppel, or unless the property be money or a negotiable instrument transferable by delivery, which has come into the hands of a bona fide purchaser. The principal is not confined, however, to a recovery of the specific thing in which he has property. If the agent wrongfully converts the thing, whether it be money or other property, into some other form, as by procuring something in place of it by sale, purchase, or exchange, the principal's right attaches in equity to the proceeds in the hands of the agent, no matter how many transmutations of form the property may pass through,<sup>1</sup> and the principal may reclaim the proceeds from the agent, or may follow and reclaim them, into

<sup>99</sup> See *supra*, § 24.

<sup>1</sup> *Taylor v. Plumer*, 3 M. & S. 562, 105 Rep. 721 (1815); *Ex parte*

whosoever hands they may come, so long as the original thing in its substituted form can be identified, until his right of recovery is cut off by the intervention of a bona fide purchaser.<sup>2</sup> The basis of the doctrine is the right of property. It proceeds upon the theory that in equity the product or avails of that which is the principal's property belong to him, and have imputed to them the nature of the original property. Whether the product or avails are in the hands of the agent, or have come into the hands of a third person, who is not a bona fide purchaser, equity converts the person in whose hands they are into a trustee.<sup>3</sup>

It follows that the agent's trustee in bankruptcy in such a case has no right, as against the principal, to any such property in the agent's hands,<sup>4</sup> that the rights of an attaching creditor are inferior to those of the principal;<sup>5</sup> that the principal may reclaim such property from a mere volunteer or from a purchaser with notice;<sup>6</sup> and that, when funds to which the principal's equitable right has attached have been deposited by him in the bank, the bank can assert no lien or claim thereon, even with the agent's consent, if it had notice of the principal's beneficial ownership.<sup>7</sup>

Cooke, *In re Strachan*, L. R. 4 Ch. D. 123 (1876); *Third Nat. Bank v. Gas Co.*, 36 Minn. 75, 30 N. W. 440 (1886).

<sup>2</sup> *In re Hallett's Estate*, L. R. 13 Ch. D. 696 (1879); *Central Nat. Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693 (1881); *Importers' & Traders' Nat. Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319 (1890); *Roca v. Byrne*, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599 (1895); *Amer. Realty Co. v. Amey*, 121 Me. 545, 118 Atl. 475 (1922).

Cf. *Hanford v. Duchastel*, 87 N. J. Law, 205, 93 Atl. 586 (1914).

<sup>3</sup> *Twohy Mercantile Co. v. Melbye*, 78 Minn. 357, 81 N. W. 20 (1899).

<sup>4</sup> *Taylor v. Plumer*, 3 M. & S. 562, 105 Rep. 721 (1815); *Chesterfield Mfg. Co. v. Dehon*, 22 Mass. (5 Pick.) 7, 16 Am. Dec. 367 (1827); *Ex parte Cooke*, L. R. 4 Ch. D. 123 (1876).

<sup>5</sup> *Merrill v. Bank*, 36 Mass. (19 Pick.) 32 (1837); *FARMERS' & MECHANICS' NAT. BANK v. KING*, 57 Pa. 202, 98 Am. Dec. 215, Powell, Cas. Agency, 296 (1868).

<sup>6</sup> *Riehl v. Association*, 104 Ind. 70, 3 N. E. 633 (1885).

<sup>7</sup> *Central Nat. Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693

The chief difficulty which arises in such cases is in establishing the identity of some particular fund with the property or fund which was originally subject to the trust, particularly when it has been mixed with other moneys of the trustee. Formerly it was held that, if the fund had become confused with other moneys, so as to be indistinguishable therefrom, the equity was lost.<sup>8</sup> It is established, however, that confusion does not do away with the equity entirely, but converts it into a charge upon the entire fund, which is superior to the claims of the general creditors of the trustee.<sup>9</sup> This doctrine has even been so far extended by some courts as to hold that it is enough if the particular property or fund can be traced into the estate of the trustee, so as to augment it, without tracing the trust fund into any specific fund or property, and that in such case the beneficiary is entitled to a charge or lien upon the general assets of the estate superior to the rights of the general creditors;<sup>10</sup> but this now finds little support. If the principal is unable to trace the trust property into any specific property or fund, or at least to make it appear that the proceeds are in fact included in the estate remaining for distribution, the trust creditor is not entitled to preference.<sup>11</sup>

(1881); *Baker v. Bank*, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150 (1885); *Union Stockyards Nat. Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724 (1890).

<sup>8</sup> *Taylor v. Plumer*, 3 M. & S. 562, 105 Rep. 721 (1815).

<sup>9</sup> *Broadbent v. Barlow*, 3 De Gex, F. & J. 570, 45 Rep. 999 (1861); *Frith v. Cartland*, 34 L. J. Ch. 301 (1865); *Van Alen v. Bank*, 52 N. Y. 1 (1873); *In re Hallett's Estate*, L. R. 13 Ch. D. 696 (1879); *Central Nat. Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693 (1881).

<sup>10</sup> *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90 (1883); *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287 (1886), overruled by *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383 (1894); *Davenport Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049, 20 Am. St. Rep. 442 (1890); *Pundmann v. Schoenich*, 144 Mo. 149, 45 S. W. 1112 (1898).

<sup>11</sup> *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504 (1887); *Continental Nat. Bank v. Weems*, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85

**RECOVERY BY P. FROM T. FOR LOSS OF SERVICE  
OF A.**

117. When a third person, by his wrongful act inflicted upon an agent, deprives the P. of his services, or knowingly entices from the service of the P. an agent who is employed under a contract, such person is liable to P. for the loss of service thereby caused.

A master may recover for the actual damage he may suffer by the wrongful act of a third person inflicted upon his servant, whereby he is deprived, in whole or in part, of the latter's services.<sup>12</sup> Thus action lies for assault and battery upon a servant,<sup>13</sup> for false arrest or imprisonment,<sup>14</sup> or for negligence impairing his ability to serve.<sup>15</sup> This doctrine appears to be equally applicable where the relation is that of principal and agent, provided a contract of employment exists, giving the principal a right to the agent's services.

While a contract imposes no liability upon one who is not a party to it, an action to recover damages for malicious interference with contract has become recognized in England,<sup>16</sup> and in some jurisdictions in this country.<sup>17</sup>

(1888); Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696 (1890); Philadelphia Nat. Bank v. Dowd, 38 Fed. 172, 2 L. R. A. 480 (C. C. 1889); Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570 (1890); Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383 (1894); Metropolitan Nat. Bank v. Commission Co., 77 Fed. 705 (C. C. 1896); Twohy Mercantile Co. v. Melbye, 78 Minn. 357, 81 N. W. 20 (1899).

<sup>12</sup> Jaggard, *Torts*, 634.

<sup>13</sup> Fluker v. Railroad Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328 (1889), dictum.

<sup>14</sup> Woodward v. Washburn, 3 Denio, 369 (N. Y. 1846); St. Johnsbury & L. C. R. Co. v. Hunt, 55 Vt. 570, 45 Am. Rep. 639 (1882).

<sup>15</sup> Ames v. Railroad Co., 117 Mass. 541, 19 Am. Rep. 426 (1875).

<sup>16</sup> Lumley v. Gye, 2 El. & B. 216, 118 Rep. 749 (1853); Bowen v. Hall, L. R. 6 Q. B. D. 333 (1881); Temperton v. Russell, [1893] 1 Q. B. 715.

<sup>17</sup> Angle v. Railroad Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55

When the contract is between master and servant, there is probably no conflict that action lies. Knowingly enticing from the service of his master a servant who is employed under a contract is an actionable wrong, even in jurisdictions which do not extend the doctrine to other contracts.<sup>18</sup> It seems that the existence of a contract giving the plaintiff a right to the services is necessary.<sup>19</sup> Whether, if the rule is exceptional in its application to contracts of employment, it extends to all cases where a person is employed to give his personal services under the direction of the employer, there is disagreement. In England it has been held that such an action lies for wrongfully procuring an opera singer to break her contract with the manager of a theater.<sup>20</sup> In a similar case in Kentucky it was held that the action could not be maintained, because it was not the policy of the law to restrict competition, whether concerning property or personal services, and the only occasion for more stringent regulation of the latter is where some one of the domestic relations exists.<sup>21</sup>

(1894); Wheeler Stenzel Co. v. American W. G. Co., 202 Mass. 471, 89 N. E. 28, L. R. A. 1915F, 1076 (1909); Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461 (1917). See article "Inducing Breach of Contract," Sayre, 36 Harv. Law Rev. 663, for summary of cases and applications of rule in the labor controversies.

<sup>18</sup> Walker v. Cronin, 107 Mass. 555 (1871); Jones v. Blocker, 43 Ga. 331 (1871); Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780 (1874); Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475 (1876); Huff v. Watkins, 15 S. C. 82, 40 Am. Rep. 680 (1881).

<sup>19</sup> Sykes v. Dixon, 9 Ad. & E. 693, 112 Rep. 1374 (1839); Campbell v. Cooper, 34 N. H. 49 (1856); Walker v. Cronin, 107 Mass. 555, 563 (1871).

<sup>20</sup> Lumley v. Gye, 2 El. & B. 216, at page 227, 118 Rep. 749 (1853).

"It extends to every grade of service." Per Rodman, J., in Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780 (1874).

<sup>21</sup> Bourlier v. Macauley, 91 Ky. 135, 15 S. W. 60, 11 L. R. A. 550, 34 Am. St. Rep. 171 (1891); Accord: Swain v. Johnson, 151 N. C. 93, 65 S. E. 619, 28 L. R. A. (N. S.) 615 (1909); Sleeper v. Baker, 22 N. D. 386, 134 N. W. 716, 39 L. R. A. (N. S.) 864, Ann. Cas. 1914B, 1189 (1911).

## CHAPTER XIV

### DETERMINATION OF CONTRACTING PARTIES—RIGHTS AND LIABILITIES OF A. AND T. INTER SESE

- 118. Significance of Form in Which Contract is Embodied.
- Determination of Contracting Parties—
- 119. Sealed Instruments.
- Negotiable Instruments—
- 120. General Rule.
- 121. Rules of Interpretation.
- 122. Extrinsic Evidence.
- 123. Parties Other than Maker,
- Written Contracts—
- 124. General Rule.
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- 127. Foreign Principal.
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- Liability of A. to T. for Unauthorized Acts—
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- 132. Measure of Damages.
- Liability of A. to T. on Quasi Contract—
- 133. Money Received in Good Faith.
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- 135. Money Received from P. for T.
- Torts—
- 136. Misfeasance.
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- Liability of T. to A.—
- 138. Where A. has Interest in Subject-Matter.
- 139. When Professed Agent is Real Principal.
- 140. Money Had and Received.
- 141. Torts.

### SIGNIFICANCE OF FORM IN WHICH CONTRACT IS EMBODIED

- 118. When an agent, acting within his scope for a disclosed P. makes a contract with T., the form employed may make this the contract of P., or of A., or of

neither. Emphasis upon form is greatest as to sealed instruments, and less, successively, as to negotiable instruments, written contracts, and oral contracts.

An agent, whether authorized to bind P. or not, may so conduct the negotiations with T. as to become personally liable. Where an agent is acting for an undisclosed or unnamed principal, this liability has been discussed.<sup>1</sup> The liability of an agent when acting for a disclosed principal, within or without the scope of his authority or power, is the subject-matter of this chapter.

When an agent acting for a disclosed principal, within the scope of his authority or power, contracts in the name of the principal, the principal, and he only, acquires rights and liabilities as to T.<sup>2</sup> The form of the contract may, however, change this result, so that (1) A. alone will be liable; or (2) neither A. nor P. will be liable; or (3) A. or P. will be presumptively liable, with a right in the parties litigant to show which party was intended to be bound. Decisions emphasize the significance of form more as to written contracts than as to oral contracts,<sup>3</sup> and more as to sealed instruments<sup>4</sup> and negotiable instruments<sup>5</sup> than as to other written contracts. In the case of written instruments generally this is justified by the principle back of the rule excluding parol evidence to vary the terms of a written contract.<sup>6</sup> As to sealed instruments the emphasis

<sup>1</sup> See sections 99, 100, *supra*.

<sup>2</sup> *Johnson v. Ogilby*, 3 P. Wm. 277, 24 Rep. 1064 (1734); *Robins v. Bridge*, 3 M. & W. 114, 150 Rep. 1079 (1837); *Judson v. Gray*, 11 N. Y. 408, 411 (1854); *WHITNEY v. WYMAN*, 101 U. S. 392, 25 L. Ed. 1050, Powell, Cas. Agency, 300 (1880); *Jones v. Gould*, 123 App. Div. 236, 108 N. Y. Supp. 31 (1908); *In re Blanchard*, 253 Fed. 758 (D. C. 1918).

<sup>3</sup> Contrast cases in footnotes 1 and 7, pp. 337, 338.

<sup>4</sup> *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521 (1834); *WHITNEY v. WYMAN*, 101 U. S. 392, 25 L. Ed. 1050, Powell, Cas. Agency, 300 (1880); *Fowle v. Kerchner*, 87 N. C. 49 (1882).

<sup>5</sup> *Walker v. Christian*, 62 Va. (21 Grat.) 291 (1871).

<sup>6</sup> See cases in footnote 1, p. 337, *infra*.

on form is based upon the fact that the contract involved is historically a formal contract;<sup>7</sup> that is, one recognized by the courts because the parties have gone through certain forms. The forms being essential to the existence of any contract in such case, emphasis upon form must be expected until courts discard the distinction between formal and simple contracts. Negotiable instruments are sometimes called formal contracts, but this is misleading. They are contracts in which form is important, but the reason for this is that such instruments are made for the purpose of being transferred from hand to hand, and hence must indicate on their faces the parties having rights and liabilities thereon.<sup>8</sup> Commercial convenience demands certainty. The necessity of easy ascertainment of the contracting parties is more controlling than the desirability of ascertaining exactly the intent of the parties. The extent of A.'s liability to T. when A. has been acting for a disclosed principal and within his scope of authority or power depends, therefore, upon the rules of law as to the manner in which A. executes his acknowledged authority or power.<sup>9</sup>

#### DETERMINATION OF CONTRACTING PARTIES— SEALED INSTRUMENTS

119. He is a contracting party whose formal acts have made the sealed instrument. The body of the sealed instrument must purport to be the act of P. or the act of A. If the body of the sealed instrument purports to be the act of P., A. cannot be, and P. probably is, the contracting party. If the body of the instrument purports to be the act of A., P. still can be the contracting party by an unequivocal signing and sealing in P.'s name; but generally A. is the contracting party.

<sup>7</sup> See cases in footnotes 10, 11, and 12, p. 317, *infra*.

<sup>8</sup> BARLOW v. CONGREGATIONAL SOCIETY, 90 Mass. (8 Allen) 460, Powell, Cas. Agency, 306 (1864).

<sup>9</sup> See summary at end of section 127, *infra*.

In a true formal contract he is bound, who has done the prescribed formal acts.<sup>10</sup> Thus no one who is not named in and described as a party to a sealed instrument can be charged,<sup>11</sup> or maintain an action,<sup>12</sup> upon it. The instrument, if made by an agent, to be binding upon the principal, must be executed in his name.<sup>13</sup> The formal acts must purport to be the acts of the principal, and not of the agent who is authorized to do them. The most common instrument under seal is a deed or instrument affecting realty. In such an instrument there are five parts, which are examined to determine whose act the instrument is. These are: (1) The description of the parties;<sup>14</sup> (2) the description of the grantor or assignor;<sup>15</sup> (3) the description of the person who makes the covenants, if any are made;<sup>16</sup> (4) the testimonium clause,<sup>17</sup> and (5) the signature and seal.<sup>18</sup>

<sup>10</sup> *Blanchard v. Archer*, 93 App. Div. 459, at page 463, 87 N. Y. Supp. 665 (1904).

<sup>11</sup> See cases in footnote 24, section 93, p. 258, *supra*.

As to cases where the seal is superfluous, see section 93, *supra*.

Statutes dispensing with seals in whole or in part have been passed in many jurisdictions. Some such jurisdictions hold that the common law as to the execution of sealed instruments has been abolished. *Gibbs v. Dickson*, 33 Ark. 107 (1878).

Contra: *Jones v. Morris*, 61 Ala. 518 (1878). See note, 23 Col. Law Rev. 663.

<sup>12</sup> See cases in footnote 24, section 93, p. 258, *supra*.

<sup>13</sup> "It was resolved that, when any one has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act, of him who gives the authority." *Combes' Case*, 9 Coke 75a, 77 Rep. 843 (1613); *Stone v. Wood*, 7 Cow. 453, 17 Am. Dec. 529 (N. Y. 1827); *Brinley v. Mann*, 56 Mass. (2 Cushing) 337, 48 Am. Dec. 669 (1848).

<sup>14</sup> *Berkey v. Judd*, 22 Minn. 287, at page 300 (1875).

<sup>15</sup> *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274 (1850).

<sup>16</sup> *Jones v. Morris*, 61 Ala. 518 (1878); *Stinchfield v. Little*, 1 Me. (1 Greenl.) 231, 10 Am. Dec. 65 (1821).

<sup>17</sup> *Hutchins v. Byrnes*, 75 Mass. (9 Gray) 367 (1857); *BRAD-STREET v. BAKER*, 14 R. I. 546, Powell, Cas. Agency, 303 (1884).

<sup>18</sup> P. will be held bound by any one of several forms of signature: "For J. B., M. W. [L. S.]," *Wilks v. Back*, 2 East. 142, 102 Rep. 323

From such examination the court may conclude that the instrument in question is the act of P., the act of A., or the act of neither. As to a sealed instrument, both P. and A. cannot be liable.<sup>19</sup>

The first four of these factors determine the purport of the body of the instrument. This body of the instrument must purport to be either the act of P. or the act of A. Thus if the party, grantor and covenantor, be described as "John Jones," and "John Jones" is the name of the principal, the body of the instrument purports to be the instrument of the principal. Conversely, if "John Jones" were the name of the agent, such description would make the instrument, in its body, purport to be the act of the agent. If the party, grantor and covenantor, be described as "John Jones, Agent,"<sup>20</sup> or "John Jones, Agent for Richard Roe,"<sup>21</sup> or John Jones, with some other descriptive title attached,<sup>22</sup> then it is generally held that the body of the instrument purports to be John Jones' act, and not the act of his principal.

The purport of the body of the instrument is very persuasive as to whose act it is, but is not conclusive. If the body of the instrument purports to be P.'s act, A. cannot be the contracting party.<sup>23</sup> P. probably will be held the

(1802); "P., by His Atty. in Fact [L. S.]," *Berkey v. Judd*, 22 Minn. 287, at page 300 (1875); "A. for P. [L. S.]," *Mussey v. Scott*, 61 Mass. (7 Cush.) 215, 54 Am. Dec. 719 (1851); "A., Atty. for P. [L. S.]," *Hale v. Woods*, 10 N. H. 470, 34 Am. Dec. 176 (1839); "A., Agent," *BRADSTREET v. BAKER*, 14 R. I. 546, Powell, Cas. Agency, 303 (1884).

<sup>19</sup> See section 93, *supra*.

<sup>20</sup> *Buge v. Newman*, 61 Misc. Rep. 84, 113 N. Y. Supp. 198, affirmed 132 App. Div. 928, 118 N. Y. Supp. 1097 (1909).

<sup>21</sup> *Stone v. Wood*, 7 Cow. 453, 17 Am. Dec. 529 (N. Y. 1827).

<sup>22</sup> "A., Trustee of P. Society," *Taft v. Brewster*, 9 Johns. 334, 6 Am. Dec. 280 (N. Y. 1812); "We, a committee," etc., *Fullam v. Inhabitants of West Brookfield*, 91 Mass. (9 Allen) 1 (1864); *Dayton v. Warne*, 43 N. J. Law. 659 (1881).

<sup>23</sup> *Whitehead v. Reddick*, 34 N. C. 95 (1851); *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131 (1883).

contracting party,<sup>24</sup> but may not.<sup>25</sup> Thus, if the body of the instrument clearly purport to be P.'s act, and A. affixes his individual name and seal, P. is not bound on the instrument,<sup>26</sup> because it has not been executed as his act, and A. is not bound on it,<sup>27</sup> because the body of the instrument prevents it from being regarded as his act. When the instrument names P. throughout, and there is no mention of A. in the instrument whatever, it clearly purports to be the act of P. Suppose in such a case A. affixes P.'s name thereto, without any indication that it was affixed by a representative. Massachusetts has held this not binding on P., since P. might have no way of ascertaining who had signed his name.<sup>28</sup> The weight of authority is clearly contrary, holding that it is not necessary for it to appear on the face of the instrument that it is executed by attorney.<sup>29</sup>

Although the body of the instrument purports to be A.'s act, because of the use of A.'s name, followed by expressions generally regarded as merely *descriptio personæ*, still an unequivocal signing and sealing in P.'s name will cause

<sup>24</sup> Where the form of the signature is insufficient to charge P. in law, the obligation may be enforced in equity. *Gerdes v. Moody*, 41 Cal. 335 (1871); *Daughtrey v. Knolle*, 44 Tex. 450 (1876); *Hubbard v. Swofford*, etc., Co., 209 Mo. 495, 108 S. W. 15, 123 Am. St. Rep. 488 (1907); *Gillespy v. Hollingsworth*, 169 Ala. 602, 53 South. 987 (1910).

<sup>25</sup> *Abbey v. Chase*, 60 Mass. (6 CUSH.) 54 (1850); *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131 (1883).

<sup>26</sup> Cf. *Ellis v. Stone*, 21 N. M. 730, 158 Pac. 480, L. R. A. 1916F, 1228 (1916).

<sup>27</sup> See cases in footnote 25, p. 319, *supra*.

<sup>28</sup> See cases in footnote 23, p. 318, *supra*.

<sup>29</sup> *Wood v. Goodridge*, 60 Mass. (6 CUSH.) 117, 52 Am. Dec. 771 (1850).

<sup>29</sup> *Devinney v. Reynolds*, 1 Watts & S. 328 (Pa. 1841); *Forsyth v. Day*, 41 Me. 382 (1856); *Deakin v. Underwood*, 37 Minn. 98, 33 N. W. 318, 5 Am. St. Rep. 827 (1887).

Cf. *Tiger v. Button Land Co.*, 91 Neb. 433, 136 N. W. 46, 41 L. R. A. (N. S.) 820, Ann. Cas. 1913D, 97 (1912).

the instrument to be construed as P.'s act.<sup>30</sup> With this exception, however, whenever the body of the instrument purports to be A.'s act, A., and A. alone, acquires rights and liabilities upon the instrument.<sup>31</sup>

### DETERMINATION OF CONTRACTING PARTIES— NEGOTIABLE INSTRUMENTS—GENERAL RULE

120. No one who is not named in or described as a party to a negotiable instrument can be charged or maintain an action upon it.

No one who is not named in or described as a party to a negotiable instrument can be charged,<sup>32</sup> or maintain an action,<sup>33</sup> upon it. Where the instrument bears on its face no indication that the maker, or payee, or other party, was acting as the representative of another, parol evidence to confer rights or liabilities upon another as the principal of that party is inadmissible.<sup>34</sup> Such evidence is, of course, inadmissible to take away any rights or liabilities of those whose names appear upon it.<sup>35</sup> The first of these rules rests

<sup>30</sup> Northwestern Distilling Co. v. Brant, 69 Ill. 658, 18 Am. Rep. 631 (1873).

<sup>31</sup> Jones v. Morris, 61 Ala. 518 (1878); Bryson v. Lucas, 84 N. C. 680, 37 Am. Rep. 634 (1881); First Baptist Church v. Harper, 191 Mass. 196, 77 N. E. 778 (1906); Reddick v. Young, 177 Ind. 632 at page 643, 98 N. E. 813 (1912).

<sup>32</sup> See footnote 30, section 93, p. 259, *supra*.

<sup>33</sup> See footnote 30, section 93, p. 259, *supra*.

<sup>34</sup> See footnote 31, section 93, p. 260, *supra*.

It may always be shown, however, that the principal was doing business in the agent's name, which may not infrequently happen in case of a partnership or corporation, and that the name signed is hence, in effect, the name of the principal. Melledge v. Iron Co., 59 Mass. (5 Cush.) 158, 51 Am. Dec. 59 (1849); Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225 (1868); Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929 (1893).

<sup>35</sup> Davis v. England, 141 Mass. 587, 6 N. E. 731 (1886); Robinson v. Kanawha Val. Bank, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829 (1886); Scantlebury v. Talcott, 84 Misc. Rep. 400, 146 N. Y. Supp.

upon the undesirability of having rights and liabilities in persons other than those whose names appear on the face of a negotiable instrument, and the second rule rests upon the principle that it is not competent by parol evidence to contradict the terms of a written contract. Thus, if the instrument is clearly P.'s instrument, T. cannot hold A.,<sup>36</sup> and can hold P.,<sup>37</sup> even though P.'s name has been affixed thereto by A. If, however, the instrument is clearly A.'s instrument, P. has no rights or liabilities thereon, although T. knew that A. was acting for P.,<sup>38</sup> and A. has all of the rights and liabilities upon it.<sup>39</sup>

#### DETERMINATION OF CONTRACTING PARTIES— NEGOTIABLE INSTRUMENTS—RULES OF INTERPRETATION

121. When both P. and A. are named in a negotiable instrument, there are three parts of the instrument which afford bases for inference as to which is the contracting party, namely:

- (1) The signature;
- (2) The body of the instrument; and
- (3) Names printed on the instrument's head or margin.

184 (1914); *In re Barron's Estate*, 92 Vt. 460, 105 Atl. 255 (1918); *United Drug Co. v. Bedell*, 145 Ark. 96, 223 S. W. 372 (1920).

<sup>36</sup> *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. Ed. 1078 (1881); *Falk v. Moebs*, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266 (1888); *Liebscher v. Kraus*, 74 Wis. 387, 43 N. W. 166, 5 L. R. A. 496, 17 Am. St. Rep. 171 (1889).

<sup>37</sup> It is not necessary for an authorized agent to do more than affix P.'s name to a note, in order to bind P. No indication that it was signed by a representative is necessary. *Forsyth v. Day*, 41 Me. 382 (1856); *First Nat. Bank v. Loyhed*, 28 Minn. 396, 10 N. W. 421 (1881); *Flat Top Nat. Bank v. Parsons*, 90 W. Va. 51, 110 S. E. 491, at page 495 (1922).

<sup>38</sup> *Sparks v. Dispatch Trans. Co.*, 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351 (1891).

<sup>39</sup> *Davis v. England*, 141 Mass. 587, 6 N. E. 731 (1886).

Frequently, however, when both are named, it is difficult to determine from the instrument itself whether the promise is that of the principal or of the agent; and even when only the agent is named, the instrument may contain some indication of an intention to bind the principal. Unfortunately the courts are not agreed as to whether it is ever permissible to resort to extrinsic evidence to ascertain the intention of the parties, nor are the courts which hold it permissible to resort to extrinsic evidence, when the intention is not clear in accord as to the particular cases in which the exception is applicable.

In determining whose promise the instrument is, there are three parts of the instrument which afford bases for inference: (1) The signature; (2) the body of the instrument; and (3) names printed at the head or margin of the instrument. Certain forms of signature are very generally recognized as sufficient to make the instrument P.'s and not A.'s. Thus, any one of these forms binds P. and not A.; "P., by A.;"<sup>40</sup> "A., for P.;"<sup>41</sup> "for P., A.;"<sup>42</sup> "A.,

<sup>40</sup> Somers v. Hanson, 78 Or. 429, 153 Pac. 43 (1915). A. held not liable, although by another rule of law P. could not be charged. Grafton Nat. Bank v. Wing, 172 Mass. 513, 52 N. E. 1067, 43 L. R. A. 831, 70 Am. St. Rep. 303 (1899).

<sup>41</sup> Rice v. Gove, 39 Mass. (22 Pick.) 158, 33 Am. Dec. 724 (1839).

<sup>42</sup> Ex parte Buckley, 14 M. & W. 469, 153 Rep. 559 (1845); Alexander v. Sizer, L. R. 4 Ex. 102 (1869).

The provisions of the Negotiable Instruments Law give rise to an interesting problem. Section 38 of the New York law (Consol. Laws, c. 38) provides that: "The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency." Section 40 of the same statute provides that: "A signature by 'procuration' operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority." Does this last section provide a form of signature which eliminates the power of A. to bind P. in cases of apparent or ostensible authority, or does this section qualify the language of section 38, so as to restrict all vicarious liability on negotiable instruments to cases where A. acted as he was directed by P.? The former alternative is probably the law. Thus under the same

Agent for P.”<sup>43</sup> These forms all clearly indicate that A. has acted as the representative or scribe.

Where there is nothing in the body of the instrument to indicate on whose behalf it is made, but it bears the signature of a corporation, followed by the name of a person describing himself as an officer, it is generally held that the corporation, and not the agent, is bound.<sup>44</sup> Thus, where a note read, “We promise to pay,” and was signed “Warrick Glass Works,” and thereunder appeared the name of “J. Price Warrick, Pres.,” it was held to be the note of the corporation. “The name of a corporation, so placed,” said the court, “raises the implication of a corporate liability. \* \* \* The name of an officer of such corporation, to which name the official title is appended, but beneath the corporate name, implies the relation of principal and agent. It means that, inasmuch as every corporate act must be done by the hand of a natural person, this person is the agent by whose hand the corporation did the particular act.”<sup>45</sup> The use of the word “we” raises no implication that the note is the joint note of the corporation and the officer; the word “we” being often used by corporations. The cases are, however, conflicting. Such a note has been held the joint note of the corporation and of the officer.<sup>46</sup>

form of statute in O'Reilly v. Richardson, 17 Ir. Com. L. R. 74 (1865). a signature, “For T. R., T. P.,” was held not a signature “per proc.,” and hence T. R., the principal, was held bound although the agent's act was unauthorized in fact. Cf. Charles v. Blackwell, L. R. 2 C. P. D. 151, at page 159 (1877).

<sup>43</sup> Rawlings v. Robson, 70 Ga. 595 (1883).

Courts distinguish cases where A. signs “Agent for P.” from those in which he signs “Agent of P.” Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101 (1867).

<sup>44</sup> Liebscher v. Kraus, 74 Wis. 387, 43 N. W. 166, 5 L. R. A. 496, 17 Am. St. Rep. 171 (1889); Reeve v. Bank, 54 N. J. Law, 208, 23 Atl. 853, 16 L. R. A. 143, 33 Am. St. Rep. 675 (1891).

<sup>45</sup> Reeve v. Bank, 54 N. J. Law, 208, 23 Atl. 853, 16 L. R. A. 143, 33 Am. St. Rep. 675 (1891).

<sup>46</sup> Mathews v. Mattress Co., 87 Iowa, 246, 54 N. W. 225, 19 L. R. A. 676 (1893).

Cf. Chapman v. Smethurst, [1909] 1 K. B. 73, and comment thereon in 7 Mich. Law Rev. 428.

Where, in lieu of a written signature, the seal of the corporation containing its name is affixed in the proper place, the effect is the same as if the name had been signed.<sup>47</sup>

### DETERMINATION OF CONTRACTING PARTIES— NEGOTIABLE INSTRUMENTS—EXTRINSIC EVIDENCE

122. In many jurisdictions, but not in all, if upon the face of the instrument there is any indication that the person executing it is agent of another person, parol evidence is admissible between the original parties, and against a purchaser with notice, to show that it was the intention of the parties to bind the principal, and not the agent; and if such intention is shown the instrument is held to be binding upon the principal, and not upon the agent.

If an unequivocal form of signature is not employed, a given court might reach any one of four conclusions, either (1) that it is the note of P.; or (2) that it is the note of A.; or (3) that it is presumptively the note of P., but that extrinsic evidence as to the intent of the parties may be resorted to, to overcome this presumption; or (4) that it is presumptively the note of A., but that extrinsic evidence as to the intent of the parties may be resorted to, to overcome this presumption. Some jurisdictions refuse to allow any such extrinsic evidence.<sup>48</sup> In such jurisdictions,

<sup>47</sup> Scanlan v. Keith, 102 Ill. 634, 40 Am. Rep. 624 (1882); Guthrie v. Imbrie, 12 Or. 182, 6 Pac. 664, 53 Am. Rep. 331 (1885); Miller v. Roach, 150 Mass. 140, 22 N. E. 634, 6 L. R. A. 71 (1889); Planters' Chemical & Oil Co. v. Stearnes, 189 Ala. 503, 66 South. 699 (1914).

<sup>48</sup> BARLOW v. CONGREGATIONAL SOCIETY, 90 Mass. (8 Allen) 460, Powell, Cas. Agency, 306 (1864).

"Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable." Lord El-

the signature not being one which clearly binds P., A. is held personally liable, unless the recitals in the body of the instrument<sup>49</sup> or the printing of the principal's name at the head or in the margin<sup>50</sup> of the instrument sufficiently indicate that A. acted for P. and intended to bind P. Where such recitals preclude the inference of a personal

lenborough in *Leadbitter v. Farrow*, 5 M. & S. 345, 105 Rep. 1077 (1816).

In such a jurisdiction A. does not make P. the contracting party merely by adding to his signature the words "Agent," "Agent of P.," "Treasurer P. Co.," or the like. These are regarded as descriptive personae. *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409 (1871); *Davis v. England*, 141 Mass. 587, 6 N. E. 731 (1886); *Robinson v. Kanawha Val. Bank*, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829 (1886); *Mfgs.' & Traders' Bank v. Love*, 13 App. Div. 561, 43 N. Y. Supp. 812 (1897); *Western, etc., Co. v. McMillen*, 71 Neb. 686, 99 N. W. 512 (1904). In this case the court suggested that, as between the original parties, an equitable suit to reform the note to conform to the intent of the parties would be entertained.

The law of these jurisdictions has been substantially modified by section 39 of the Negotiable Instruments Law. See copy thereof in section 129, infra. *Jump v. Sparling*, 218 Mass. 324, 105 N. E. 878 (1914).

<sup>49</sup> *BARLOW v. CONGREGATIONAL SOCIETY*, 90 Mass. (8 Allen) 460, Powell, Cas. Agency, 306 (1864). In this case the principal was named. The promise was by the signer "as treasurer of" the society and by him or his "successors," which precluded the appearance of his personal obligation.

*Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521 (1834). "We, the undersigned committee for the first school district, promise in behalf of said school district," and signed by individual names of members of committee, with word "Committee" opposite their names, held not to be the note of the members.

So a direction in the body to charge the sum directed to be paid, to P., will cause the draft so drawn and signed, "A., Agent," to be held the draft of P. *Tripp v. Paper Co.*, 30 Mass. (13 Pick.) 291 (1832).

Cf. *Werner v. Emerson Hotel, etc., Co., Inc.*, 192 N. Y. Supp. 273 (Sup. 1922). This seems erroneous.

<sup>50</sup> *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360 (1871).

A check directing payment to T., signed, "A., Treasurer," and having the printed words "Ætna Mills" in the margin, was held to bind the corporation, and not A.

Contra: *Casco Nat. Bk. v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705 (1893).

promise by A., the instrument will be construed as P.'s<sup>51</sup>

In jurisdictions allowing extrinsic evidence to overcome a presumption, A.'s liability is very greatly diminished. If an indication appears on the face of the instrument that A. is acting for another,<sup>52</sup> or if the maker merely adds to his signature words such as "Agent," "Treasurer of P. Co.," or the like, the instrument is still *prima facie* A.'s,<sup>53</sup> but extrinsic evidence is admissible to show it was intended to be P.'s instrument, and not A.'s.<sup>54</sup> "The evidence is not adduced to discharge the agent from a personal liability which he has assumed, but to prove that in fact he never incurred that liability; not to aid in the construction of the instrument, but to prove whose instrument it is."<sup>55</sup>

<sup>51</sup> BARLOW v. CONGREGATIONAL SOCIETY, 90 Mass. (8 Allen) 460, Powell, Cas. Agency, 306 (1864); Scanlan v. Keith, 102 Ill. 634, 40 Am. Rep. 624 (1882).

<sup>52</sup> In Mechanics' Bank v. Bank, 18 U. S. (5 Wheat.) 326, 5 L. Ed. 100 (1820), a check, with the words "Mechanics' Bank of Alexandria" at the top and in the margin, drawn on the Bank of Columbia, and payable to the order of P. H. Minor, was signed Wm. Paton, Jr. Parol evidence was admitted to show that he was cashier of the former bank, and to establish the official character of the check. Johnson, J., said: "The appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate, and not an individual, transaction, to which must be added \* \* \* that the cashier is the drawer, and the teller the payee, and the form of ordinary checks deviated from by the substitution of 'to order' for 'to bearer.' The evidence, therefore, on the face of the bill, predominates in favor of its being a bank transaction." This is a leading case upon the admission of parol evidence, and carries the doctrine to its extreme limit.

See Planters' Chemical & Oil Co. v. Stearnes, 189 Ala. 503, 66 South. 699 (1914).

<sup>53</sup> Brockway v. Allen, 17 Wend. 40 (N. Y. 1837). Reeve v. First Nat. Bank, 54 N. J. Law, 208, 23 Atl. 853, 16 L. R. A. 143, 33 Am. St. Rep. 675 (1891).

<sup>54</sup> Brockway v. Allen, 17 Wend. 40 (N. Y. 1837); Kean v. Davis, 21 N. J. Law, 683, 47 Am. Dec. 182 (1847); Laflin & Rand Powder Co. v. Sinsheimer, 48 Md. 411, 30 Am. Rep. 472 (1877); Metcalf v. Will-Hams, 104 U. S. 93, 26 L. Ed. 665 (1881); KEIDAN v. WINEGAR, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705, Powell, Cas. Agency, 310 (1893); Second Nat. Bank v. Midland Steel Co., 155 Ind. 581, 58 N. E. 833, 52 L. R. A. 307 (1900).

<sup>55</sup> Green, C. J., in Kean v. Davis, 21 N. J. Law, 683, at page 687,

The admission of such extrinsic evidence varies according to the parties to the litigation. Such evidence is quite generally received as between the immediate parties,<sup>56</sup> and as between the maker and a subsequent holder, who took with knowledge of the actual facts.<sup>57</sup> Since the rule is confined to cases where an indication of the representative character of the maker appears upon the face of the instrument, it would seem that it should be applicable, even against a subsequent holder who was ignorant of the actual facts, since he would be charged with constructive notice of whatever appeared upon the face of the instrument, and would hence, apparently, be put upon inquiry as to the circumstances of its execution. And it is held, where this rule prevails, that the ambiguity may be so grave as to charge him with constructive notice.<sup>58</sup> Nevertheless it is held that the mere addition to the signature of the words "Agent," "Trustee," "Treasurer," and the like, does not of itself make third persons chargeable with notice of any representative relation of the signer.<sup>59</sup> As to what indication would be necessary to charge a purchaser with notice, it is impossible to formulate any rule.

<sup>47</sup> Am. Dec. 182 (1847). See, also, *Hayes v. Crane*, 48 Minn. 39, 50 N. W. 925 (1892).

<sup>56</sup> *Brockway v. Allen*, 17 Wend. 40 (N. Y. 1837).

<sup>57</sup> *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665 (1881).

<sup>58</sup> *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665 (1881); *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705 (1893); *First Nat. Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038 (1896).

<sup>59</sup> *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665 (1881).

**DETERMINATION OF CONTRACTING PARTIES—  
NEGOTIABLE INSTRUMENTS—PARTIES  
OTHER THAN MAKER**

123. In general, the same considerations control the determination of the payee, indorser, indorsee, or acceptor as have been discussed with respect to the maker of a negotiable instrument, except where a negotiable instrument is payable to "John Jones, Cashier," in which case either the bank or cashier may sue thereon, and, if indorsed in the same manner, the bank will be liable as indorser.

The cases thus far discussed have been mostly those in which the question has been: Who was the maker of this negotiable instrument? The same problems may be presented as to who is the payee,<sup>60</sup> indorser,<sup>61</sup> indorsee,<sup>62</sup> or acceptor<sup>63</sup> of such an instrument. As to these questions there is less likelihood that recitals or printed names on the instrument will cause the instrument to be construed as P.'s. So, where an instrument is payable to "John Jones, Agent," or even to "John Jones, Agent of Richard Roe,"<sup>64</sup> the action thereon must be brought by John Jones, and if it be indorsed "John Jones, Agent," John Jones only is

<sup>60</sup> Shaw v. Stone, 55 Mass. (1 Cushing) 228 (1848); Ord v. McKee, 5 Cal. 515 (1855); Hately v. Pike, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304 (1896).

Cf. Falk v. Moebs, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266 (1888).

<sup>61</sup> Bartlett v. Hawley, 120 Mass. 92 (1876); Towne v. Rice, 122 Mass. 67 (1877); Souhegan Nat. Bank v. Boardman, 46 Minn. 293, 48 N. W. 1116 (1891).

<sup>62</sup> Fairfield v. Adams, 33 Mass. (16 Pick.) 381 (1835).

<sup>63</sup> Mare v. Charles, 5 El. & B. 978, 119 Rep. 745 (1856); Laflin & Rand Powder Co. v. Sinsheimer, 48 Md. 411, 30 Am. Rep. 472 (1877); Robinson v. Kanawha Val. Bank, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829 (1886); Eisinger v. Murphy Co., 48 App. D. C. 476 (1919).

<sup>64</sup> Ord v. McKee, 5 Cal. 515 (1855).

bound by the indorsement,<sup>65</sup> except in a jurisdiction and case in which parol evidence will be admitted under the principles before discussed.<sup>66</sup> Thus, in a Massachusetts case where a bill was payable to and indorsed by "B., Agent," in an action against him as indorser it was held that parol evidence was inadmissible to show that he was merely agent, and that the plaintiff knew the fact. "The defendants" said Gray, C. J., "appeared upon the face of the bill to be themselves the payees and indorsers, and the word "Agents" was a mere designatio personarum, and parol evidence was inadmissible to discharge them."<sup>67</sup> But in a Minnesota case, where a note was payable to and indorsed by "B., Treasurer," it was held that the indorsement was *prima facie* his individual contract, but that extrinsic evidence was admissible to show that he made it only in his official capacity as treasurer of the maker corporation.<sup>68</sup>

To the rule that one who is not named as a party to a negotiable instrument cannot maintain an action or be charged thereon there is an apparent exception, applicable to paper payable to the cashier of a bank, which prevails even where parol evidence is in other cases inadmissible to show the intention of the parties. By usage the name of such officer, with his title "Cashier," has become established as the alternative designation of the bank. Where paper is so made payable to him, an action may be maintained thereon by the bank,<sup>69</sup> or by the cashier,<sup>70</sup> and,

<sup>65</sup> Bartlett v. Hawley, 120 Mass. 92 (1876).

Cf. Babcock v. Beman, 11 N. Y. 200 (1854).

<sup>66</sup> Souhegan Nat. Bank v. Boardman, 46 Minn. 293, 48 N. W. 1118 (1891).

<sup>67</sup> Bartlett v. Hawley, 120 Mass. 92 (1876); Towne v. Rice, 122 Mass. 67 (1877), "B., Receiver."

<sup>68</sup> Souhegan Nat. Bank v. Boardman, 46 Minn. 293, 48 N. W. 1116 (1891).

Cf. Babcock v. Beman, 11 N. Y. 200 (1854).

<sup>69</sup> Commercial Bank v. French, 38 Mass. (21 Pick.) 486, 32 Am.

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<sup>70</sup> Fairfield v. Adams, 33 Mass. (16 Pick.) 381 (1835).

when indorsed by him in the same form, the indorsement is the indorsement of the bank, which may be charged thereon.<sup>71</sup> There is a tendency to apply the same rule to paper made payable to the treasurer or managing officer of other corporations.<sup>72</sup> The Negotiable Instruments Law provides: "Where an instrument is drawn or indorsed payable to a person as cashier or other fiscal officer of a bank or corporation, it is deemed to be *prima facie* payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer."<sup>73</sup>

Except in so far as affected by the rule that a bill can be accepted, except for honor, only by the drawee, and by the anomalous doctrine of unsigned and oral acceptances, the same considerations which determine the liability of the principal or of the agent upon a note or a bill made or drawn by the agent determine their liability upon an acceptance made by him. When a bill is drawn on an

Dec. 280 (1839); *Baldwin v. Bank of Newbury*, 1 Wall. (68 U. S.) 234, 17 L. Ed. 534 (1863); *First Nat. Bank v. Hall*, 44 N. Y. 395, 4 Am. Rep. 698 (1871); *Nave v. First Nat. Bank*, 87 Ind. 204 (1882).

<sup>71</sup> *Bank of New York v. State Bank of Ohio*, 29 N. Y. 619 (1864); *Houghton v. First Nat. Bank*, 26 Wis. 663, 7 Am. Rep. 107 (1870).

<sup>72</sup> *Babcock v. Beman*, 11 N. Y. 200 (1854); *Nichols v. Frothingham*, 45 Me. 220, 71 Am. Dec. 539 (1858).

"The usage is universal for presidents and cashiers of incorporated companies, acting as the executive officers and agents of such companies, to make, in their behalf, indorsements and transfers of negotiable paper, by simply indorsing their names, with additions of their titles of office. I cannot doubt that such indorsement is sufficient to charge the corporation under whose authority the indorsement is made, and to transfer the note to the indorsee, so that the latter can maintain an action thereon in his own name." Per Hall, J., in *Chillicothe Branch of State Bank v. Fox*, 3 Blatchf. 431, Fed. Cas. No. 2,683 (1856).

A note signed, "A. Co., B., Sec. and Treas.," and payable to and indorsed "B., Sec. and Treas.," held to be the note and indorsement of the A. Co., and unambiguous, and parol evidence inadmissible to show that the indorsement was that of B. personally. *Falk v. Moebs*, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266 (1888).

<sup>73</sup> See *Norton, B. & N.* (4th Ed.) Appendix, 629, § 42.

agent in his own name, whether described with or without addition "as Agent," and is accepted by him in his own name, he is liable as acceptor, even if he adds to his signature words indicating that he signs for and on behalf of a principal.<sup>74</sup> Thus, where a bill was drawn on B., who wrote across it, "Accepted for the company, B., Purser," he was personally liable.<sup>75</sup> And the same rule has been applied when the bill is addressed to him as agent of a named principal, and is accepted by him as such agent.<sup>76</sup> In jurisdictions where parol evidence is admitted, it would, however, be admissible in such cases to show that it was the intention of the parties to bind the principal.<sup>77</sup> But, when the bill is drawn on the agent in his own name, if he accepts in the name of the principal, neither is bound—not the principal, because he was not named as drawee, nor the agent, because by the manner of acceptance he has disclaimed personal responsibility.<sup>78</sup>

Conversely, where a bill is drawn on the principal, and is accepted by the agent in his own name, the agent is not liable on the bill.<sup>79</sup> It does not follow, however, that the principal may not be bound by such an acceptance. Great looseness has prevailed in respect to the formal requisites of an acceptance, and, in the absence of any statutory requirements to the contrary, unsigned, and even oral, ac-

<sup>74</sup> *Mare v. Charles*, 5 El. & B. 978, 119 Rep. 745 (1856); *Robinson v. Kanawha Val. Bank*, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829 (1886). See *Bowstead, Dig. Ag.* (1919 Ed.) art. 117.

Where a bill, headed "Office of A. Co.," was drawn by "B., Agent," and addressed to "C., Agent," who wrote across it, "Accepted, C., Agent," he was personally bound. *Slawson v. Loring*, 87 Mass. (5 Allen) 340, 81 Am. Dec. 750 (1862).

<sup>75</sup> *Mare v. Charles*, 5 El. & B. 978, 119 Rep. 745 (1856).

<sup>76</sup> *Moss v. Livingston*, 4 N. Y. 208 (1850).

Contra: *Shelton v. Darling*, 2 Conn. 435 (1818); *Eisinger v. Murphy Co.*, 48 App. D. C. 476 (1919).

<sup>77</sup> *Laflin & Rand Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472 (1877).

<sup>78</sup> *Walker v. Bank*, 9 N. Y. 582 (1854).

*Cf. Nicholls v. Diamond*, 9 Ex. 154, 156 Rep. 66 (1853).

<sup>79</sup> *Polhill v. Walter*, 3 B. & Ad. 114, 110 Rep. 43 (1832).

ceptances have been sustained. Thus, when a bill is addressed to several persons, and is accepted by one, he being the duly authorized agent of the others, by writing his name on the bill, it has been held that all are liable as acceptors, though the acceptance does not purport to be in the name of or on behalf of all.<sup>80</sup> And it has even been held, where a bill was addressed to A., and accepted by his wife by writing across it her own name, and A., on presentation, promised to pay it, that he was liable as acceptor, his promise being sufficient evidence of authority or of ratification.<sup>81</sup> In many jurisdictions to-day it is provided by statute that the acceptance must be in writing and signed by the drawee,<sup>82</sup> and where this requirement exists the cases last referred to would not be precedents.<sup>83</sup>

<sup>80</sup> Jenkins v. Morris, 16 M. & W. 877, 153 Rep. 1447 (1847).

This rule was applied to bills drawn upon a partnership and accepted by one partner, only his name appearing in the written acceptance. Beach v. State Bank, 2 Ind. 488 (1851).

<sup>81</sup> Lindus v. Bradwell, 5 C. B. 583, 136 Rep. 1007 (1848).

<sup>82</sup> Negotiable Instruments Law N. Y. (Consol. Laws, c. 38) § 220; Norton, B. & N. (3d Ed.) 472.

<sup>83</sup> Heenan v. Nash, 8 Minn. 407 (GIL. 363), 83 Am. Dec. 790 (1863).

In this case it was held that, where a bill was addressed to a firm and accepted by an individual member in his own name, neither the partnership nor the member accepting was bound. The statute provided that no person should be charged as acceptor, unless his acceptance should be "in writing, signed by himself or his lawful agent."

"If a draft were drawn on a corporation by name, and accepted by its duly authorized agent or officer in his individual name, adding his official designation, the acceptance would be deemed that of the corporation, for only the drawee can accept a bill." Per Mitchell, J., in Souhegan Nat. Bank v. Boardman, 46 Minn. 293, 48 N. W. 1116 (1891).

## DETERMINATION OF CONTRACTING PARTIES— WRITTEN CONTRACTS—GENERAL RULE

124. Where an agent, acting within his scope for a disclosed principal, makes a contract in writing, not under seal, and not negotiable, whether the agent or the principal is the contracting party depends upon the intention of the parties as disclosed by the terms of the instrument as a whole.

When a contract in writing, not under seal or negotiable, is made by an agent for a disclosed principal, either the P. or the A. is bound,<sup>84</sup> but generally both cannot be. Whether a written contract, not under seal or negotiable, is to be deemed the personal contract of the agent or the contract of his principal depends upon the intention of the parties as disclosed by the writing. The technical rules governing the execution of contracts under seal do not apply, and a somewhat more liberal interpretation than prevails in respect to negotiable instruments is adopted. If the meaning is clear, it matters not how the contract is phrased, nor how it is signed, whether by the name of the agent for the principal, or with the name of the principal by the agent, or merely in the name of the agent.<sup>85</sup>

If, indeed, the contract is signed in the name of the agent without qualification, and no sufficient indication of a contrary intention appears upon the face of the instrument,

<sup>84</sup> It is possible that neither P. nor A. will be liable. *Fowle v. Kerchner*, 87 N. C. 49 (1882); *Ellis v. Stone*, 21 N. M. 730, 158 Pac. 480, L. R. A. 1916F, 1228 (1916).

Cf. *Knickerbocker v. Wilcox*, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595 (1890).

<sup>85</sup> *Spittle v. Lavendar*, 2 Brod. & B. 452, 129 Rep. 1041 (1821); *WHITNEY v. WYMAN*, 101 U. S. 392, 25 L. Ed. 1050, Powell, Cas Agency, 300 (1880); *Goodenough v. Thayer*, 132 Mass. 152 (1882); *Wheeler v. Walden*, 17 Neb. 122, 22 N. W. 346 (1885); *DOWNS v. BANKHEAD*, 44 App. D. C. 101, Powell, Cas. Agency, 314 (1915); Park's Ann. Civ. Code Ga. (1914) § 3594.

he is conclusively bound;<sup>86</sup> but, if a contrary intention does appear, it will control.<sup>87</sup>

Thus, when the writing states that the undertaking is "on account of,"<sup>88</sup> or "in behalf of,"<sup>89</sup> a named principal, although the signature is unqualified, the principal, and not the agent, is bound. The mere fact, however, that the agent describes himself as agent, whether in the body of the instrument<sup>90</sup> or in the signature,<sup>91</sup> even though the principal be named, is insufficient to show that he does not intend to contract personally. Even a contract in which

<sup>86</sup> Paice v. Walker, L. R. 5 Ex. 173 (1870); Miller v. Early, 58 S. W. 789 (Ky. 1900).

<sup>87</sup> Fowle v. Kerchner, 87 N. C. 49 (1882); Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528, 100 N. E. 457, 461 (1912); DOWNS v. BANKHEAD, 44 App. D. C. 101, Powell, Cas. Agency, 314 (1915); Ellis v. Stone, 21 N. M. 730, 158 Pac. 480, L. R. A. 1916F, 1228 (1916).

<sup>88</sup> Gadd v. Houghton, L. R. 1 Ex. D. 357 (1876).

<sup>89</sup> Key v. Parnham, 6 Har. & J. 418 (Md. 1825); Andrews v. Estes 11 Me. 267, 26 Am. Dec. 521 (1834).

Otherwise, if in another part of the contract the agent undertakes personally. Norton v. Herron, 1 C. & P. 648 (1825), "the said G. H. doth hereby agree"; Tanner v. Christian, 4 El. & B. 591, 119 Rep. 217 (1855).

<sup>90</sup> Paice v. Walker, L. R. 5 Ex. 173 (1870); Guernsey v. Cook, 117 Mass. 548 (1875); Matthews v. Jenkins, 80 Va. 463 (1885); Fowler v. McKay, 88 Neb. 387, 129 N. W. 551 (1911).

<sup>91</sup> Brown v. Bradlee, 156 Mass. 28, 30 N. E. 85, 15 L. R. A. 509, 32 Am. St. Rep. 430 (1892).

This was an action to recover a reward which was offered in a writing in the following terms: "\$2,500 reward will be paid to any person furnishing evidence that will lead to the arrest and conviction of the person who shot X. [Signed] B., C., D., Selectmen of Milton." It was held that the defendants were personally liable. "Perhaps," said Holmes, J., "our conclusion is a little strengthened by the consideration that \* \* \* the defendants had not authority to bind the town for more than \$500. For although, of course, an agent does not make a promise his own by exceeding his authority, if it purports to bind his principal only, still, when the construction is doubtful, the fact that he has no authority \* \* \* is a reason for reading his words as directed towards himself." See, also, Knickerbocker v. Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595 (1890); Candler v. DeGive, 133 Ga. 486, 66 S. E. 244 (1909); Park's Ann. Civ. Code, Ga. (1914) § 3570.

the agent contracts "as agent of A." has been held binding upon him personally,<sup>92</sup> though this case has been doubted.<sup>93</sup> "Although an agent is duly authorized," said Shaw, C. J., "if by the terms of his contract he binds himself personally, and engages expressly in his own name, to pay or perform other obligations, he is responsible, though he described himself as agent."<sup>94</sup>

The constructions placed by different courts upon similar instruments are frequently irreconcilable, and very slight indications of an intention to bind the principal are frequently construed as controlling the presumption that words descriptive of the relation are to be deemed mere *descriptio personæ*.<sup>95</sup> Conversely, if the agent adds to his signature words indicating that he signs for and on behalf of his principal, he is not personally liable unless a con-

<sup>92</sup> *Paice v. Walker*, L. R. 5 Ex. 173 (1870). In this case the language was: "Sold A. B. 200 quarters of wheat (as agent of C., F. & Co., Danzig.)"

<sup>93</sup> *Gadd v. Houghton*, L. R. 1 Ex. D. 357 (1876).

"As," preceding "agent," "trustee," and the like, indicates that the person referred to contracts in his representative capacity. *Hayes v. Crane*, 48 Minn. 39, 50 N. W. 925 (1892).

<sup>94</sup> *Simonds v. Heard*, 40 Mass. (23 Pick.) 120, at page 125, 34 Am. Dec. 41 (1839); *Cox v. Borstadt*, 49 Colo. 83, 111 Pac. 64 (1910).

<sup>95</sup> *Rogers v. March*, 33 Me. 106 (1851); *Cook v. Gray*, 133 Mass. 106 (1882); *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680 (1885); *State v. Commissioners*, 60 Neb. 566, 83 N. W. 733 (1900).

An agreement between "W., superintendent of the K. Mining Company, parties of the first part, and P., party of the second part," by which "the said parties of the first part" agree to deliver at P.'s mill ore from the K. mine to be milled by P., and signed "W., Supt. K. Mining Co.," is the contract of the company. "By the subject-matter of this contract," said Gray, J., "which is the delivery and milling of ore from the Keets mine, by the description of Whitney, both in the body of the contract and in the signature, as superintendent of the Keets Mining Company, and by the use of the words 'parties of the first part,' which are applicable to a company and not to a single individual, the contract made by the hand of Whitney clearly appears upon its face to have been intended to bind, and therefore did bind, the company, and, upon proof that Post was a partner in the company, bound him." *Post v. Pearson*, 108 U. S. 418, 2 Sup. Ct. 799, 27 L. Ed. 774 (1883).

trary intention is elsewhere disclosed,<sup>96</sup> but, if so disclosed, it will be given effect.<sup>97</sup> The agent may also use such words as to bind both the principal and himself, as where he contracts for the principal and assumes the obligation of a surety.<sup>98</sup>

### DETERMINATION OF CONTRACTING PARTIES— WRITTEN CONTRACTS—EXTRINSIC EVIDENCE

125. When the agent appears by the terms of the writing to have contracted personally, parol evidence is inadmissible to show that in fact he merely contracted as agent, and was not intended to be personally liable.

**EXCEPTION**—In some jurisdictions, if the agent is described as such, and it does not otherwise clearly appear by the instrument that he contracted personally, he is only *prima facie* liable, and may show by extrinsic evidence that he was not intended to be bound.

The construction of a written instrument is for the court.<sup>99</sup> Where it clearly appears from the contract that the agent contracts personally, parol evidence is inadmissible to show that he contracted as agent, and that it was

<sup>96</sup> Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366 (1901).

Cf. H. O. Brandt & Co. v. H. N. Morris & Co., Limited, 87 L. J. R. K. B. 101 (1917), and comment thereon in 16 Mich. Law Rev. 656.

<sup>97</sup> Lennard v. Robinson, 5 El. & B. 125, 119 Rep. 428 (1855); Knickerbocker v. Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595 (1890).

<sup>98</sup> Young v. Schuler, L. R. 11 Q. B. D. 651 (1883).

<sup>99</sup> Tanner v. Christian, 4 El. & Bl. 591, 119 Rep. 217 (1855); Fowle v. Kerchner, 87 N. C. 49 (1882); Hayes v. Crane, 48 Minn. 39, 50 N. W. 925 (1892); Jones v. Gould, 123 App. Div. 236, 108 N. Y. Supp. 31 (1908).

not the intention of the parties that he should be personally bound, for such evidence would contradict the written contract.<sup>1</sup> In case of ambiguity, parol evidence may be admitted.<sup>2</sup> It seems that, although the instrument contains words describing the agent as such, if upon ordinary principles of construction the words are to be taken as mere *descriptio personæ*, and there is no further indication of intention to bind the principal, parol evidence is not admissible to control the construction.<sup>3</sup> In some jurisdictions, however, it has been held that, where such words as "agent," "trustee," and the like, are affixed to the name of a party to the contract, they are *prima facie* descriptive only, but that it may be shown by extrinsic evidence that they were intended and understood by the parties as determining the character in which he contracted.<sup>4</sup>

Although parol evidence is not admissible to show that the person who appears to be is not bound, evidence of custom is sometimes admissible to show that the agent, notwithstanding that he contracted merely as such, is also personally liable. For this purpose evidence of custom or

<sup>1</sup> *Jones v. Littledale*, 6 Ad. & E. 486, 112 Rep. 186 (1837); *Higgins v. Senior*, 8 M. & W. 834, 151 Rep. 1278 (1841); *Hernandez v. Brookdale Mills, Inc.*, 194 App. Div. 369, 185 N. Y. Supp. 485 (1920).

<sup>2</sup> *McCollin v. Gilpin*, L. R. 6 Q. B. D. 516 (1881); *State v. Commissioners*, 60 Neb. 566, 83 N. W. 733 (1900); *De Remer v. Brown*, 165 N. Y. 410, 59 N. E. 129 (1901); *DOWNS v. BANKHEAD*, 44 App. D. C. 101, *Powell, Cas. Agency*, 314 (1915); *Ellis v. Stone*, 21 N. M. 730, 158 Pac. 480, L. R. A. 1916F, 1228 (1916); *Hernandez v. Brookdale Mills, Inc.*, 194 App. Div. 369, 185 N. Y. Supp. 485 (1920).

<sup>3</sup> *Higgins v. Senior*, 8 M. & W. 834, 151 Rep. 1278 (1841); *Jones v. Littledale*; 6 Ad. & E. 486, 112 Rep. 186 (1837); *Walker v. Christian*, 62 Va. (21 Grat.) 291 (1871).

<sup>4</sup> *Peterson v. Homan*, 44 Minn. 166, 46 N. W. 303, 20 Am. St. Rep. 564 (1890); *Rhone v. Powell*, 20 Colo. 41, 36 Pac. 899 (1894); *Solomon v. N. J. Indemnity Co.*, 94 N. J. Law, 318, 110 Atl. 813, affirmed 95 N. J. Law, 545, 113 Atl. 927 (1921).

Where B. contracts "as assignee of A." an insolvent, the contract so clearly expresses that he contracts in his representative capacity that parol evidence is inadmissible to charge B. personally. *Hayes v. Crane*, 48 Minn. 39, 50 N. W. 925 (1892).

usage in the particular business, to the effect that an agent so contracting is also personally liable on the contract, may be admitted,<sup>5</sup> provided the custom or usage is not inconsistent with the express terms of the contract.<sup>6</sup>

## DETERMINATION OF CONTRACTING PARTIES— ORAL CONTRACTS

126. When the contract is not in writing, whether the agent or principal is the contracting party is a question depending upon the intention of the parties, as disclosed by all the circumstances of the transaction, and is for the jury.

When the contract is not reduced to writing, the question whether the agent contracted merely as agent or personally depends upon the intention of the parties, and, where the evidence conflicts, is for the jury.<sup>7</sup> Where the principal is disclosed, and the agent is known to be acting as such, he cannot be made personally liable, unless he agreed to be so.<sup>8</sup> The intention is to be ascertained from all the circumstances attending the transaction. Thus, if an agent verbally orders goods, he is personally liable, un-

<sup>5</sup> *Pike v. Ongley*, L. R. 18 Q. B. D. 708 (1887); See Bowstead, *Dig. Ag.* (1919 Ed.) art. 119.

<sup>6</sup> *Barrow v. Dyster*, L. R. 13 Q. B. D. 635 (1884).

<sup>7</sup> *Owen v. Gooch*, 2 Esp. 567 (1797); *Hovey v. Pitcher*, 13 Mo. 191 (1850); *Steamship Bulgarian Co. v. Merchants' Dispatch Transportation Co.*, 135 Mass. 421 (1883); *Anderson v. Timberlake*, 114 Ala. 377, 22 South. 431, 62 Am. St. Rep. 105 (1896); *Siler v. Perkins*, 126 Tenn. 380, 149 S. W. 1060, 47 L. R. A. (N. S.) 232 (1912). "It is the disclosed intention that governs." *Park's Ann. Civ. Code Ga.* (1914) § 3611.

<sup>8</sup> *Owen v. Gooch*, 2 Esp. 567 (1797); *Ex parte Hartop*, 12 Ves. 349, 33 Rep. 132 (1806); *Foster v. Persch*, 68 N. Y. 400 (1877); *WHITNEY v. WYMAN*, 101 U. S. 392, 25 L. Ed. 1050, Powell, Cas. Agency, 300 (1880); *Anderson v. Timberlake*, 114 Ala. 377, 22 South. 431, 62 Am. St. Rep. 105 (1896); *Bleau v. Wright*, 110 Mich. 183, 68 N. W. 115 (1896); *Sultzner v. Lutz*, 184 Iowa, 1031, 169 N. W. 341 (1918).

less the seller knows that he is contracting merely as agent,<sup>9</sup> but, if he orders the goods in his principal's name, he is not liable, unless he gives his personal credit.<sup>10</sup>

So, where a broker sells goods by auction, and invoices them in his own name as seller, it is a question for the jury whether the invoice was intended to be the contract, and, if so, the broker is personally liable; but, if the invoice was not so intended, it is a question for the jury whether it was intended by the parties that the broker contracted personally.<sup>11</sup> So, when an agent buys at auction, and gives his own name, he is personally liable, unless it is clearly proved that he did not intend to bind himself personally, and that the auctioneer so understood.<sup>12</sup>

#### DETERMINATION OF CONTRACTING PARTIES— FOREIGN PRINCIPAL

127. In England (it seems), but not in the United States, when an agent contracts on behalf of a foreign principal, he is presumed to contract personally, unless a contrary intention appears from the terms of the contract or from the surrounding circumstances.

According to the rule frequently declared in England, when an agent contracts in that country on behalf of a foreign principal he is presumed to contract personally, unless a contrary intention appears from the terms of the contract or from the surrounding circumstances.<sup>13</sup> "Where a foreign merchant has authorized English merchants to

<sup>9</sup> Seaber v. Hawkes, 5 M. & P. 549 (1831).

<sup>10</sup> Johnson v. Ogilby, 3 P. Wm. 277, 24 Rep. 1064 (1734); Owen v. Gooch, 2 Esp. 567 (1797); Ex parte Hartop, 12 Ves. 352, 33 Rep. 132 (1806).

<sup>11</sup> Jones v. Littledale, 6 Ad. & E. 486, 112 Rep. 186 (1837).

<sup>12</sup> Williamson v. Barton, 7 H. & N., 899, 158 Rep. 733 (1862).

<sup>13</sup> Elbinger Actien-Gesellschaft v. Claye, L. R. 8 Q. B. 313 (1873); Hutton v. Bulloch, L. R. 9 Q. B. 572 (1874).

act for him, I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorized the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain showing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner."<sup>14</sup> When the contract is in writing, however, and it clearly appears that the agent contracted for the principal and not as agent, it has been held that the agent is not bound.<sup>15</sup>

In this country the existence of a usage or custom so ingrafted into the common law as to become a rule, and creating a presumption in all cases that the agent is exclusively liable, has been denied. The question in each case is to whom credit was in fact given, and when goods are sold to a home agent, or a contract is made with him, the fact that he acts for a foreign principal is merely evidence that the agent, and not the principal, is bound, and must be considered in connection with other facts entering into the question of credit.<sup>16</sup> When the contract is in writing, if the terms are clear and unambiguous, the contract must be deemed the final repository of the intention of the parties;

<sup>14</sup> Per Blackburn, J., in *Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313 (1873).

<sup>15</sup> *Green v. Kopke*, 18 C. B. 549, 139 Rep. 1484 (1856); *Gadd v. Houghton*, L. R. 1 Ex. D. 357 (1876).

In *Glover v. Langford* (1892) 8 T. L. R. 628, Charles, J., said: "In point of law there is no distinction as to the liability of an agent acting in behalf of an English or a foreign principal; it is always a question of fact."

<sup>16</sup> *Kirkpatrick v. Stainer*, 22 Wend. 244 (N. Y. 1839); *Oelricks v. Ford*, 64 U. S. (23 How.) 49, 16 L. Ed. 534 (1859); *Bray v. Kettell*, 83 Mass. (1 Allen) 80 (1861); *Kaulback v. Churchill*, 59 N. H. 296 (1879); *Maury v. Ranger*, 38 La. Ann. 485, 58 Am. Rep. 197 (1886); *Whalen v. Saunders*, 90 Vt. 393, 98 Atl. 901 (1916).

Cf. *Rogers v. March*, 33 Me. 106 (1851).

and, if it is in form a contract by the principal only, the agent must be exonerated, without regard to the fact that the principal is resident in a foreign country.<sup>17</sup> Whatever weight the consideration that the principal is a resident of a foreign country may have, it seems that a resident in another state stands upon the same footing as a home principal.<sup>18</sup>

Summarizing, then, we find that an agent acting within the scope of his authority and power to bind P. may nevertheless incur personal liability to T.:

- (1) When he executes a sealed instrument as his act; or
- (2) When he personally becomes the maker, indorser, or acceptor of a negotiable instrument; or
- (3) When a written contract made by him fails to show or indicate that he contracted on behalf of another; or
- (4) When, in an oral contract, the parties intended it to be the agent's contract personally; or
- (5) Under the early English rule, when an agent contracts on behalf of a foreign principal.

#### DETERMINATION OF CONTRACTING PARTIES —PUBLIC AGENTS

**128.** The form of the contract does not impose personal liability upon a public agent, unless it clearly appears that he pledged his personal credit.

The liabilities thus imposed upon A. are subject to exception in the case of public agents. It is held generally that for an instrument under seal,<sup>19</sup> or a negotiable instru-

<sup>17</sup> *Bray v. Kettell*, 83 Mass. (1 Allen) 80 (1861).

<sup>18</sup> *Vawter v. Baker*, 23 Ind. 63 (1864); *Barham v. Bell*, 112 N. C. 131, 16 S. E. 903 (1893).

<sup>19</sup> *Hodgson v. Dexter*, 5 U. S. (1 Cranch) 345, 2 L. Ed. 130 (1803); *KNIGHT v. CLARK*, 48 N. J. Law, 22, 2 Atl. 780, 57 Am. Rep. 534, Powell, Cas. Agency, 317 (1886).

ment,<sup>20</sup> or a contract,<sup>21</sup> to be binding upon a public agent, his intent to be personally bound must clearly appear. It has been doubted, however, whether the distinction applicable to public agents applies to officers or agents of a town or other municipal corporation, capable of contracting and liable to an action on its contracts.<sup>22</sup> A public servant does not impliedly warrant his authority.<sup>23</sup>

#### LIABILITY OF A. TO T. FOR UNAUTHORIZED ACTS—ON THE CONTRACT

129. When an agent, acting outside his scope for a disclosed principal, executes a negotiable instrument, or professes to contract, in the name of an alleged principal, who is nonexistent, he thereby becomes liable to T. on the contract.

The liability to T. of A., acting on behalf of a disclosed principal, *but not within the scope of his authority or power* is very general. In a few situations this is a liability upon the contract itself. Thus the Negotiable Instruments Law provides that, "where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly

<sup>20</sup> Jones v. Le Tombe, 3 U. S. (3 Dall.) 384, 1 L. Ed. 647 (1798); School Town of Monticello v. Kendall, 72 Ind. 91, 37 Am. Rep. 139 (1880).

Contra: Schools of Village of Cahokia v. Rautenberg, 88 Ill. 219 (1878); Wing v. Glick, 56 Iowa, 473, 9 N. W. 384, 41 Am. Rep. 118 (1881).

<sup>21</sup> Belknap v. Reinhart, 2 Wend. 375, 20 Am. Dec. 621 (N. Y. 1829); Parks v. Ross, 52 U. S. (11 How.) 362, 13 L. Ed. 730 (1850); McCurdy v. Rogers, 21 Wis. 199, 91 Am. Dec. 468 (1866); Sparta School Township v. Mendell, 138 Ind. 188, 37 N. E. 604 (1894); Rood v. Murray, 50 Mont. 240, 146 Pac. 541 (1914).

<sup>22</sup> Brown v. Bradlee, 156 Mass. 28, 30 N. E. 85, 15 L. R. A. 509, 32 Am. St. Rep. 430 (1892).

<sup>23</sup> Dunn v. Macdonald, [1897] 1 Q. B. 401, and comment thereon in 11 Harv. Law Rev. 60.

*authorized*; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.”<sup>24</sup> The effect of the words in italics appears to be to render an agent who signs in a representative capacity, but without authority, liable on the instrument, thus making for the parties a contract which was not in contemplation, and changing the common-law rule that one who contracts in the name of an ostensible principal is not liable upon the contract; his only liability on contract being upon an implied warranty of authority.<sup>25</sup>

Where a person professes to contract in the name of an alleged principal, but no such principal is in existence, it has been declared that the professed agent is liable upon the contract. Thus, where a contract was entered into by the promoters of a proposed corporation on its behalf, in which case, as we have seen, there can be no ratification, since to admit of ratification the contract must be made on behalf of some person in existence, it was held that the professed agents were bound. “Where a contract is signed,” said Erle, C. J., “by one who professes to be signing ‘as agent,’ but who has no principal existing at the time, and the contract would be altogether inoperative, unless binding upon the person who signed it, he is bound thereby, and a stranger cannot by a subsequent ratification relieve him from that responsibility.”<sup>26</sup> The statement as to the liability of a professed agent when no principal exists was hardly necessary to the decision, for the contract, which in terms described the corporation as “proposed,” was construed as one in which the parties contemplated that the persons signing should be personally liable. And the existence of any rule, which, by reason of there not being at the time any principal in existence who can be bound, can

<sup>24</sup> Laws, N. Y. 1909, c. 43 (Consol. Laws, c. 38) § 39. See Norton, B. & N. (4th Ed.) Appendix, 625, § 20.

<sup>25</sup> Post, section 130.

<sup>26</sup> Kelner v. Baxter, L. R. 2 C. P. 174 (1866).

convert the position of a person signing the name of an alleged principal, without using language indicating an intention to be bound personally, into the position of a contracting party, has been controverted.<sup>27</sup> There is, however, some authority for holding personally liable upon this ground a person who contracts professedly on behalf of a voluntary association,<sup>28</sup> which, being neither a corporation nor a partnership, is not a legal entity.<sup>29</sup>

It is conceded that the rule, if it exists, does not apply where an agent contracts on behalf of a principal who, without his knowledge, has died since the authority was conferred. In such case, if the agent was aware of the fact of his principal's death, it seems that he would be liable in deceit or upon an implied warranty of authority.<sup>30</sup>

#### LIABILITY OF A. TO T. FOR UNAUTHORIZED ACTS—WARRANTY OF AUTHORITY— GENERAL RULE

130. Every person who professes to contract as agent is deemed to warrant that he is in fact authorized to make the contract, and is liable for any loss sustained by T. by breach of such implied warranty, even where A. acted in good faith, under a mistaken belief that he had such authority. If such representation was made fraudulently, T. may sue in deceit.

<sup>27</sup> Hollman v. Pullin, 1 Cababe & E. 254 (1884). See, also, Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240 (1870); Fowle v. Kerchner, 87 N. C. 49 (1882).

<sup>28</sup> Comfort v. Graham, 87 Iowa, 295, 54 N. W. 242 (1893); Coding v. Munson, 52 Neb. 580, 72 N. W. 846, 66 Am. St. Rep. 524 (1897); Little Rock Furniture Mfg. Co. v. Kavanaugh, 111 Ark. 575, 164 S. W. 289, 51 L. R. A. (N. S.) 406, Ann. Cas. 1916A, 848 (1914).

<sup>29</sup> See section 71, *supra*.

<sup>30</sup> Smout v. Ilbery, 10 M. & W. 1, 152 Rep. 357 (1842); Carriger v. Whittington, 26 Mo. 311, 72 Am. Dec. 212 (1858).

When a person without authority makes a contract on behalf of another, the latter is not bound unless he ratifies the contract. If the professed agent contracts in his own name, he is, of course, personally liable on the contract. If, however, he contracts in the name of the ostensible principal, the professed agent is not liable on the contract, because it does not purport to be his, and to hold him liable on it would be "to make a contract, not to construe it."<sup>31</sup> This rule is sustained by principle and authority, though there are some decisions which hold him liable on the contract.<sup>32</sup> The remedy of the third person who contracts with the professed agent, in reliance upon the authority which he asserts, but does not possess, must therefore be sought in some other form of action than an action on the contract.

If the agent fraudulently represents that he is authorized, when he is not, he is, upon familiar principles, liable in an action of tort for deceit; and this, whether the representation of authority is express, or is merely implied

<sup>31</sup> Jenkins v. Hutchinson, 13 Q. B. 744, 116 Rep. 1448 (1849); Duncan v. Niles, 32 Ill. 532, 83 Am. Dec. 293 (1863); McCurdy v. Rogers, 21 Wis. 199, 91 Am. Dec. 468 (1866); Noyes v. Loring, 55 Me. 408 (1867); Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240 (1870); Sheffield v. Ladue, 16 Minn. 388 (Gil. 346), 10 Am. Rep. 145 (1871); Dung v. Parker, 52 N. Y. 494 (1873); Senter v. Monroe, 77 Cal. 347, 19 Pac. 580 (1888); Cole v. O'Brien, 34 Neb. 68, 51 N. W. 316, 33 Am. St. Rep. 616 (1892); Groeltz v. Armstrong, 125 Iowa, 39, 99 N. W. 128 (1904); Le Roy v. Jacobosky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977 (1904); American Surety Co. v. Morton, 32 Okl. 687, 122 Pac. 1103, 39 L. R. A. (N. S.) 702 (1912); Tedder v. Riggin, 65 Fla. 153, 61 South. 244 (1913); People's Nat. Bank v. Dixwell, 217 Mass. 436, 105 N. E. 435, Ann. Cas. 1915D, 722 (1914).

Cf. Cal. Civil Code (1915) § 2343.

<sup>32</sup> Roberts v. Button, 14 Vt. 195 (1842); Weare v. Gove, 44 N. H. 196 (1862); Solomon v. Penoyer, 89 Mich. 11, 50 N. W. 644 (1891); KENNEDY v. STONEHOUSE, 13 N. D. 232, 100 N. W. 258, 3 Ann. Cas. 217, Powell, Cas. Agency, 319 (1904); Wisconsin Farm Co. v. Watson, 160 Wis. 638, 152 N. W. 449 (1915).

Dusenbury v. Ellis, 3 Johns. Cas. 70, 2 Am. Dec. 144 (N. Y. 1802), and other early New York cases to the same effect, have been overruled. White v. Madison, 26 N. Y. 117 (1862); Simmons v. More, 100 N. Y. 140, 2 N. E. 640 (1885).

from his assuming to act as one having authority.<sup>33</sup> So long as he is aware of his want of authority, it is immaterial whether he makes this representation, actually intending a fraud, or merely in reckless disregard whether it be true or false. On the other hand, if he honestly, but mistakenly, believes that he has authority, he is not liable in an action of deceit.

The effect of the foregoing doctrines being to leave a person who enters into a contract with another as agent without remedy, where the professed agent has acted under a mistaken belief that he has authority, as in the case of a supposed agent acting under a forged power of attorney, which he believes to be genuine, has led the courts to resort to the fiction of an implied contract or warranty of authority.<sup>34</sup> "The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation which arises in such a case is well expressed by saying that a person, professing to contract as agent of another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he pro-

<sup>33</sup> Polhill v. Walter, 3 B. & Ad. 114, 110 Rep. 43 (1832); White v. Madison, 26 N. Y. 117 (1862); Duncan v. Niles, 32 Ill. 532, 83 Am. Dec. 293 (1863); Noyes v. Loring, 55 Me. 408 (1867); May v. Telegraph Co., 112 Mass. 90 (1873); Dung v. Parker, 52 N. Y. 494 (1873); Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718 (1882).

Cf. Smout v. Ilbery, 10 M. & W. 1, 152 Rep. 357 (1842).

<sup>34</sup> Collen v. Wright, 8 El. & B. 647, 120 Rep. 241 (1857); Richardson v. Williamson, L. R. 6 Q. B. 276 (1871); Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718 (1882); In re National Coffee Palace Co., L. R. 24 Ch. D. 367 (1883); Skaaraas v. Finnegan, 31 Minn. 48, 16 N. W. 456 (1883), 32 Minn. 107, 19 N. W. 729 (1884); Farmers' Co-op. Trust Co. v. Floyd, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846 (1890); Taylor v. Nostrand, 134 N. Y. 108, 31 N. E. 246 (1892); Seeberger v. McCormick, 178 Ill. 404.

fesses to have does in point of fact exist.”<sup>35</sup> The implied undertaking or warranty of the agent extends as well to cases in which he exceeds his authority as to cases in which he has no authority at all. Nor is the rule confined to the case of one person inducing another to enter into a contract; for, if the professed agent induces the other to enter into any transaction which he would not have entered into, but for the representation of authority, the rule applies.<sup>36</sup>

#### LIABILITY OF A. TO T. FOR UNAUTHORIZED ACTS—WARRANTY OF AUTHORITY— EXCEPTION

131. When a person who contracts as agent, acting in good faith, either stipulates that he shall not be responsible for any want of authority, or discloses all the facts known to him upon which his supposed authority rests, he is not deemed to represent that he is in fact duly authorized.

The want of authority may arise from a lack of legal capacity on the part of the principal. In such case it seems

53 N. E. 340 (1899); *Oliver v. Bank of England*, [1902] 1 Ch. 610, forged power; *Anderson v. Adams*, 43 Or. 621, 74 Pac. 215 (1903); *Kent v. Addicks*, 126 Fed. 112, 60 C. C. A. 660 (1903); *Chieppo v. Chieppo*, 88 Conn. 233, 90 Atl. 940 (1914); *People's Nat. Bank v. Dixwell*, 217 Mass. 436, 105 N. E. 435, Ann. Cas. 1915D, 722 (1914); Cal. Civil Code (1915) § 2342.

<sup>35</sup> *Collen v. Wright*, 8 El. & B. 647, 120 Rep. 241 (1857). See Radcliffe, “Some Recent Developments of the Doctrine of *Collen v. Wright*,” 18 L. Q. R. 364-375.

<sup>36</sup> Plaintiff having entered into a binding contract with a company to accept its debenture stock in payment of a debt, defendant directors issued stock, which without their knowledge was an overissue. Held, that they were liable on an implied warranty that they had authority to issue valid stock. *Fairbank's Ex'rs v. Humphreys*, L. R. 18 Q. B. D. 54 (1886).

*Oliver v. Bank of England*, [1902] 1 Ch. 610, and comment thereon in 16 Harv. Law Rev. 311.

that the assuming agent is liable upon the implied warranty,<sup>37</sup> unless the incapacity has occurred without his knowledge since his appointment,<sup>38</sup> or the parties, being equally informed as to the facts, act under a mutual mistake of law.<sup>39</sup>

If the contract is made on such terms that the agent stipulates that he shall not be responsible for any want of authority, no warranty of authority will be implied, at least in the absence of bad faith on his part. Thus, where a broker signed a charter party "per telegraphic authority," evidence was admitted to prove that, when charters are entered into by brokers in accordance with telegraphic instructions, it was usual to sign in that form, and that it was understood in the trade as negativing the implication of a warranty by the charterer's agent, at all events, to a greater extent than warranting that he had a telegram which, if correct, authorized such a charter.<sup>40</sup> And if the agent,

<sup>37</sup> Where directors of a company which had no power to accept bills accepted on its behalf, they were personally liable to a purchaser without notice, on an implied warranty of authority; the company's powers being defined by private act, and the representation held to be of fact, and not of law. *West London Com. Bank v. Kitson*, L. R. 13 Q. B. D. 360 (1884).

In *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178 (1885), it was held that the infancy of the principal was not a breach of the warranty of authority, unless the act of the professed agent was entirely without the infant's knowledge or consent, since the contract, if authorized, would be voidable, and not void.

Contra: *Hall v. Lauderdale*, 46 N. Y. 70 (1871).

<sup>38</sup> "It seems to me that an agent is liable to be sued by a third person, if he assumed to act on his principal's behalf after he had knowledge of his principal's incompetency to act. \* \* \* In my opinion, if a person who has been held out as agent assumes to act on behalf of a lunatic, \* \* \* the pretended agent is liable to an action for misleading an innocent person." Per Brett, L. J., in *Drew v. Nunn*, 4 Q. B. D. 661 (1879);

Cf. *Yonge v. Toynbee*, 26 T. L. R. 211 (1909) and comment thereon 23 Harv. Law Rev. 478.

<sup>39</sup> *Jefts v. York*, 64 Mass. (10 Cush.) 392 (1852); *Merchants' & Planters' Packet Co. v. Streuby*, 91 Miss. 211, 44 South. 791, 124 Am. St. Rep. 651 (1907).

<sup>40</sup> *Lilly, Wilson & Co. v. Smales, Eeles & Co.* (1892) 1 Q. B. 456.

acting in good faith, discloses all the facts upon which his authority rests, no warranty of authority can be implied.<sup>41</sup> Thus, where the defendant, after the death of her husband, but before she was informed of the fact, ordered goods from the plaintiff, who had previously supplied her on the credit of the husband, and been paid for them by him, the husband to the knowledge of the plaintiff being resident abroad, it was held that she was not liable on an implied warranty; the continuance of the life of the principal being, under the circumstances, a fact equally within the knowledge of both contracting parties, and there having been no failure on her part to state any fact within her knowledge relating to the continuance of the authority.<sup>42</sup> In this case the authority of the agent turned upon a question of fact, namely, the continuance of the authority dependent upon the life of the principal. When the agent makes full disclosure of the facts constituting his authority, as where he shows to the other party the power of attorney or letter of instructions under which he acts, the question of his authority becomes a mere question of construction, or of law, and no warranty of the sufficiency of the authority can be implied.<sup>43</sup>

<sup>41</sup> Smout v. Ilbery, 10 M. & W. 1, 152 Rep. 357 (1842); Barry v. Pike, 21 La. Ann. 221 (1869); Hall v. Lauderdale, 46 N. Y. 72 (1871); Newman v. Sylvester, 42 Ind. 106 (1873); Ware v. Morgan, 67 Ala. 461 (1880); Michael v. Jones, 84 Mo. 578 (1884); Swearingen v. C. W. Bulger & Son, 117 Ark. 557, 176 S. W. 328 (1915).

<sup>42</sup> Smout v. Ilbery, 10 M. & W. 1, 152 Rep. 357 (1842). Contra, and announcing an undesirable doctrine, Yonge v. Toynbee, 26 T. L. R. 211 (1909) and comment thereon in 23 Harv. Law Rev. 478, and 10 Col. Law Rev. 567.

<sup>43</sup> West London Com. Bank v. Kitson, L. R. 13 Q. B. D. 360 (1884); text quoted and approved in Little Rock Furniture Mfg. Co. v. Kavanaugh, 111 Ark. 575, 164 S. W. 289, 51 L. R. A. (N. S.) 406, Ann. Cas. 1916A, 848 (1914); DOWNS v. BANKHEAD, 44 App. D. C. 101, Powell, Cas. Agency, 314 (1915).

"If the defect of authority arises from a want of legal capacity, and if the parties are under a mutual mistake of the law, and are both equally informed in regard to the facts, so that the lender is not misled by any word or act of the agent, he would have no

### LIABILITY OF A. TO T. FOR UNAUTHORIZED ACTS—WARRANTY OF AUTHORITY— MEASURE OF DAMAGES

132. The measure of damages for breach of warranty of authority is the loss directly resulting as a natural and probable consequence of the breach. When a contract is repudiated by the person on whose behalf it is made, such loss is *prima facie* the amount which would have been recoverable against him thereon upon his refusal to perform had the contract been authorized. If the contract would not have been enforceable against him, even if authorized, because the formalities required by law were not observed, there can be no recovery for breach of warranty of authority.

The measure of damages for a breach of a warranty of authority is the loss directly resulting as a natural and probable consequence of the breach.<sup>44</sup> The damages are to be arrived at by considering the difference in the position the plaintiff would have been in, had the authority existed, and the position he is actually in, in consequence of the contract or transaction being unauthorized.<sup>45</sup> When a contract made by the professed agent is repudiated, the measure of damages is what the plaintiff has lost by losing the contract, or *prima facie* the damages which would have

legal remedy against the agent, not in *assumpsit*, for it is not his contract, nor in *tort*, for he is chargeable with no *deceit*." Per Shaw, C. J., in *Jefts v. York*, 64 Mass. (10 *Cush.*) 392 (1852).

*Cf. Oliver v. Bank of England*, [1902] 1 Ch. 610.

<sup>44</sup> *Simons v. Patchett*, 7 El. & B. 568, 119 Rep. 1357 (1857); *Spedding v. Nevell*, L. R. 4 C. P. 212 (1869); *Godwin v. Francis*, L. R. 5 C. P. 295 (1870); *Skaaraas v. Finnegan*, 32 Minn. 107, 19 N. W. 729 (1884).

<sup>45</sup> Per Lord Esher in *Fairbank's Ex'ts v. Humphreys*, L. R. 18 Q. B. D. 54 (1886). A different rule of damages prevails in Florida. *Tedder v. Riggin*, 65 Fla. 153, 61 South. 244 (1913).

been recoverable against the principal, had the contract been authorized, upon his failure to perform it.<sup>46</sup> Other damages, naturally resulting from the breach, may be recovered.<sup>47</sup> Thus, when the plaintiff has incurred expense in prosecuting an action against the principal upon the contract, in which he has been defeated on the ground that the contract was unauthorized, he may also recover the costs of such action, at least if the agent has persisted in asserting his authority and the costs were justified.<sup>48</sup> It follows that, if the contract as made could not have been enforced against the principal, even if authorized, because of failure to observe formalities required by law, as in the case of a contract in which the requirements of the statute of frauds are not satisfied, there can be no recovery against the agent.<sup>49</sup>

<sup>46</sup> *In re National Coffee Palace Co.*, L. R. 24 Ch. D. 367 (1883); *Skaaraas v. Finnegan*, 31 Minn. 48, 16 N. W. 456 (1883); *Simmons v. More*, 100 N. Y. 140, 2 N. E. 640 (1885); *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340 (1899).

<sup>47</sup> *Skaaraas v. Finnegan*, 32 Minn. 107, 19 N. W. 729 (1884); *Farmers' Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846 (1890); Cal. Civil Code 1915, § 3318.

<sup>48</sup> *Collen v. Wright*, 8 El. & B. 647, 120 Rep. 241 (1857); *White v. Madison*, 26 N. Y. 117 (1862); *Godwin v. Francis*, L. R. 5 C. P. 295 (1870); *Groeltz v. Armstrong*, 125 Iowa, 39, 99 N. W. 128 (1904).

If the action against P. was prosecuted with knowledge that it would fail, T. cannot recover costs assessed therein in a subsequent action against A. *Rowland v. Hall*, 121 App. Div. 459, 106 N. Y. Supp. 55 (1907).

<sup>49</sup> *Baltzen v. Nicolay*, 53 N. Y. 467 (1873); *Kent v. Addicks*, 126 Fed. 112, 60 C. C. A. 660 (1903); *Merchants' & Planters' Packet Co. v. Streuby*, 91 Miss. 211, 44 South. 791, 124 Am. St. Rep. 651 (1907); *Jester v. Gray*, 188 Iowa, 1249, 175 N. W. 758, 177 N. W. 475 (1920); *Bowstead*, Dig. Ag. (1919 Ed.) art. 124.

**LIABILITY OF A. TO T. ON QUASI CONTRACT—  
MONEY RECEIVED IN GOOD FAITH**

133. Where money is paid by a third person to an agent for the use of his principal, under a mistake of fact, the agent is liable to repay the same, provided that the money is reclaimed before he has paid it over, or dealt to his detriment with his principal on the faith of the payment.

A., by virtue of his being the agent of P., does not thereby escape any liabilities to T. which the dealings between two individuals confer upon one as against the other. Thus, where T. has paid over money to A. under a mistake of fact, A. may be liable in an action for money had and received to T.'s use to repay it, provided the party who made the payment reclaims it before he has paid it over, or otherwise dealt to his detriment with his principal on the faith of the payment;<sup>50</sup> but, if he has in the meantime paid it over, or so dealt with his principal, he is not liable.<sup>51</sup> "An agent," said Lord Ellenborough, "who receives money for his principal is liable as a principal so long as he stands in his original situation; and until there has been a change of circumstances by his having paid over the mon-

<sup>50</sup> Buller v. Harrison, 2 Cowp. 565, 98 Rep. 1243 (1777); Mowatt v. McLelan, 1 Wend. 173 (N. Y. 1828); Smith v. Binder, 75 Ill 492 (1874); O'Connor v. Clopton, 60 Miss. 349 (1882); SIMMONDS v. LONG, 80 Kan. 155, 101 Pac. 1070, 23 L. R. A. (N. S.) 553, Powell, Cas. Agency, 323 (1909); Pancoast v. Dinsmore, 105 Me. 471, 75 Atl. 43, 134 Am. St. Rep. 582 (1909); Cox v. Borstadt, 49 Colo. 83, 111 Pac. 64 (1910).

Where one entitled to elect whether he will hold an agent or a principal, who holds money which he is *ex aequo et bono* entitled to receive, makes such election, he renounces all remedies against the other party. Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 South. 389 (1897). See Bowstead, Dig. Ag. (1919 Ed.) art. 125.

<sup>51</sup> Holland v. Russell, 4 B. & S. 14, 122 Rep. 365 (1863); Granger v. Hathaway, 17 Mich. 500 (1869); Cabot v. Shaw, 148 Mass. 459,

ey to the principal, or done something equivalent to it."<sup>52</sup> Payment to another, on behalf of the principal on faith of the credit, is equivalent to payment to the principal;<sup>53</sup> but merely crediting him with the amount is not.<sup>54</sup> Notice need not be formal, but must be such as to apprise the agent of the facts and of the intention of the other party by reason thereof to reclaim the money.<sup>55</sup> If the agent did not disclose his agency, and the other party dealt with him as principal, payment over to the real principal will be no defense.<sup>56</sup>

Such cases are to be distinguished from those in which the agent receives money as a stakeholder, as where an auctioneer receives a deposit, in which case he is liable to refund on default of the vendor, it being his duty to hold as stakeholder until the completion or rescission of the contract.<sup>57</sup>

It has been held that, when money is paid to an agent for a consideration which fails, an action for its recovery must be against the principal.<sup>58</sup>

<sup>52</sup> 20 N. E. 99 (1889); *Shepard v. Sherin*, 43 Minn. 382, 45 N. W. 718 (1890); *Hauenstein v. Ruh*, 73 N. J. Law, 98, 62 Atl. 184 (1905).

<sup>53</sup> Cf. *Sagone v. Mackey*, 225 N. Y. 594, 122 N. E. 621 (1919).

<sup>54</sup> *Cox v. Prentice*, 3 M. & S. 344, at page 348, 105 Rep. 641 (1815).

<sup>55</sup> *Cabot v. Shaw*, 148 Mass. 459, 20 N. E. 99 (1889).

<sup>56</sup> *Buller v. Harrison*, 2 Cowp. 565, 98 Rep. 1243 (1777); *Cox v. Prentice*, 3 M. & S. 344, 105 Rep. 641 (1815).

<sup>57</sup> *Shepard v. Sherin*, 43 Minn. 382, 45 N. W. 718 (1890).

<sup>58</sup> *Newall v. Tomlinson*, L. R. 6 C. P. 405 (1871); *Smith v. Kelly*, 43 Mich. 390, 5 N. W. 437 (1880).

<sup>57</sup> *Burrough v. Skinner*, 5 Burr. 2639, 98 Rep. 387 (1770).

<sup>58</sup> *Ellis v. Goulton*, [1893] 1 Q. B. 350; *Bleau v. Wright*, 110 Mich. 183, 68 N. W. 115 (1896).

**LIABILITY OF A. TO T. ON QUASI CONTRACT—  
MONEY OBTAINED WRONGFULLY**

134. When money is obtained by an agent from a third person by extortion or fraud, or otherwise wrongfully, he is liable to repay the same, although before it is reclaimed he has paid it over to his principal.

So, also, if the agent has obtained the money wrongfully, he is liable to repay it in any event, although he has paid it over to his principal, or otherwise dealt with him to his detriment, on the faith of the payment without notice or demand from the other party. Thus he is so liable if he obtains the money by extortion or illegal exaction,<sup>59</sup> or by fraud,<sup>60</sup> or under other circumstances which to his knowledge make it illegal for him to receive it.<sup>61</sup> Of course, if the wrong was that of the principal, and was not participated in or known by the agent, payment to the principal is a defense.<sup>62</sup>

<sup>59</sup> Snowdon v. Davis, 1 Taunt. 359, 127 Rep. 872 (1808), illegal distress; Ripley v. Gelston, 9 Johns. 201, 6 Am. Dec. 271 (N. Y. 1812); Elliott v. Swartwout, 35 U. S. (10 Pet.) 137, 9 L. Ed. 373 (1836); Smith v. Sleap, 12 M. & W. 585, 152 Rep. 1332 (1844), withholding documents to obtain more money than is due.

<sup>60</sup> Moore v. Shields, 121 Ind. 267, 23 N. E. 89 (1889); Hardy v. American Express Co., 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731 (1902), and comment thereon in 16 Harv. Law Rev. 369.

<sup>61</sup> Ex parte Edwards, L. R. 13 Q. B. D. 747 (1884), receiving money from debtor with notice of act of bankruptcy; Larkin v. Hapgood, 56 Vt. 597 (1884), money paid in fraud of insolvent law.

<sup>62</sup> Owen v. Cronk, [1895] 1 Q. B. 265.

**LIABILITY OF A. TO T.—MONEY RECEIVED  
FROM P. FOR T.**

135. When an agent is authorized to pay to a third person money in his hands, and expressly or impliedly promises such person to pay him, the agent is personally liable to such person for the amount so received.

So, also, an agent who is instructed by his principal to pay money in his hands to a third person does not come thereby under any obligation to the person in whose favor the payment is directed. The authority may be revoked by the principal until it is executed, or the agent has come under some binding engagement with the third person.<sup>63</sup> But, if the agent promises to pay the third person, the authority is no longer revocable,<sup>64</sup> and he becomes liable to him for the amount. In such case the money is deemed to be appropriated to the use of the promisee, who may maintain an action for money had and received to his use.<sup>65</sup>

**LIABILITY OF A. TO T.—TORTS—MISFEASANCE**

136. Where loss or injury is caused to a third person by the wrongful act or omission of an agent while acting on behalf of his principal, the agent is personally liable therefor, whether he is acting with the authority of the principal or not, to the same extent as if he were acting on his own behalf.

<sup>63</sup> Williams v. Everett, 14 East, 582, 104 Rep. 725 (1811); Malcolm v. Scott, 5 Ex. 601, 155 Rep. 263 (1850).

<sup>64</sup> See section 89, *supra*.

<sup>65</sup> Crowfoot v. Gurney, 9 Bing. 372, 131 Rep. 655 (1832); Wyman v. Smith, 4 N. Y. Super. Ct. 331 (1849); Goodwin v. Bowden, 54 Me. 424 (1867).

Where a bill drawn on an agent is payable out of a particular fund, and he promises the holder to pay when he receives money from his principal, he is liable to the holder if he subsequently receives the money. Stevens v. Hill, 5 Esp. 247 (1805).

An agent is personally liable for his wrongful acts; nor does the fact that he commits an act under direction of his principal, who is also liable, relieve him.<sup>66</sup> "For the warrant of no man, not even of the king himself, can excuse the doing of an illegal act; for, although the commanders are trespassers, so also are the persons who did the act."<sup>67</sup> It is immaterial that the agent acted in the bona fide belief that the principal had a right to do the act.

Accordingly an agent is liable if he converts the goods of a third person to his principal's use.<sup>68</sup> It is no defense that he acted in good faith and in the belief that the principal was the owner.<sup>69</sup> The various cases in which an innocent agent may be liable for conversion have been formulated by an English writer as follows:<sup>70</sup> An agent who has control or possession of goods, even if he obtained the possession from the apparent owner and acted in good faith on his authority, is guilty of a conversion if he sells and delivers or otherwise assumes to transfer the posses-

<sup>66</sup> Burnap v. Marsh, 13 Ill. 535 (1852), malicious prosecution; Wright v. Eaton, 7 Wis. 595 (1859); Bennett v. Bayes, 5 H. & N. 391, 157 Rep. 1233 (1860), illegal distress; Bennett v. Ives, 30 Conn. 329 (1862); Josselyn v. McAllister, 22 Mich. 300 (1871), false imprisonment; City of Duluth v. Mallett, 43 Minn. 205, 45 N. W. 154 (1890); Humphreys, etc., Co. v. Frank, 46 Colo. 524, 105 Pac. 1093 (1909); Owens v. Nichols, 139 Ga. 475, 77 S. E. 635 (1913).

<sup>67</sup> Sands v. Child, 3 Lev. 351, 352, 83 Rep. 725 (1694).

<sup>68</sup> Cranch v. White, 1 Bing. N. C. 414, 131 Rep. 1176 (1835); McPheters v. Page, 83 Me. 234, 22 Atl. 101, 23 Am. St. Rep. 772 (1891).

<sup>69</sup> Stephens v. Elwall, 4 M. & S. 259, 105 Rep. 830 (1815); Spraight v. Hawley, 39 N. Y. 441, 100 Am. Dec. 452 (1868); ROBINSON v. BIRD, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495, Powell, Cas. Agency, 327 (1893), auctioneer; Kearney v. Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394 (1894).

Contra: Leuthold v. Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218 (1886); Abernathy v. Wheeler, 92 Ky. 320, 17 S. W. 858, 36 Am. St. Rep. 593 (1891).

It has been held that even an innocent agent is liable, although the property sold was government bonds payable to bearer. Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581 (1867).

Contra: Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491 (1869).

<sup>70</sup> Bowstead, Dig. Ag. (1919 Ed.) art. 134 (substantially).

sion and property in the goods without the authority of the true owner,<sup>71</sup> or refuses, without qualification, to deliver the goods to the true owner on demand,<sup>72</sup> or transfers the possession to his principal or any other person, except the true owner, with notice of the claim of the true owner;<sup>73</sup> but an agent is not guilty of conversion who in good faith merely contracts on behalf of his principal to sell goods of which he has not possession or control,<sup>74</sup> or by the authority of the apparent owner, and without notice of the claim of the true owner, deals with the possession without assuming to deal with the property in the goods.<sup>75</sup>

"All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent or servant of another."<sup>76</sup> If an agent makes a false representation because his principal directed him to do so, and in consequence, believing it to be true, the necessary mental element is, of course, lacking, and the agent is not liable,<sup>77</sup> although the principal, if he knew the representation to be false, would be.<sup>78</sup> If, however, the agent makes a representation, knowing it to be false, or in reckless disregard whether it be true or false, he is liable.<sup>79</sup>

<sup>71</sup> Consolidated Co. v. Curtis, [1892] 1 Q. B. 495, and cases cited in footnote 69, p. 356, *supra*.

<sup>72</sup> Alexander v. Southeby, 5 B. & Ald. 247, 106 Rep. 1183 (1821); Lee v. Bayes, 18 C. B. 599, 139 Rep. 1504 (1856); Singer Mfg. Co. v. King, 14 R. I. 511 (1884).

<sup>73</sup> Davis v. Artingstall, 49 L. J. Ch. 609 (1880).

<sup>74</sup> Consolidated Co. v. Curtis, [1892] 1 Q. B. 495, 498, *dictum*.

<sup>75</sup> Gurley v. Armstead, 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, 12 Am. St. Rep. 555 (1889). In this last case the court said: "Whoever receives goods from one in actual, though illegal, possession thereof, and who restores the goods to such person, is not liable for a conversion by reason of having transported them. \* \* \* And this is so, apparently, even if the goods thus received were restored to the wrongful possessor after notice of the claim of the true owner."

<sup>76</sup> Cullen v. Thomson's Trustees, 4 Macq. 424, 432 (1862).

<sup>77</sup> Jaggard, *Torts*, 286.

<sup>78</sup> See footnote 10, p. 114, Chapter VI.

<sup>79</sup> Swift v. Jewsbury, L. R. 9 Q. B. 301 (1874); WEBER v.

So, where an agent assists in the commission of a breach of trust, he is personally liable.<sup>80</sup> An agent is liable in an action of deceit for a fraudulent representation of authority.<sup>81</sup>

#### LIABILITY OF A. TO T.—TORTS—NONFEASANCE

137. An agent is not liable to a third person merely by reason of failure to perform a duty which he owes to his principal; but, if he enters upon the performance of any act, he is liable to a third person for any injury resulting from his failure to exercise such reasonable care in the manner of its performance as he owes to such person.

It is commonly said that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. It is obvious that an agent incurs no liability to third persons merely because of his failure to perform a duty which he owes to his principal. "His liability \* \* \* is solely to his principal, there being no privity between him and such third persons."<sup>82</sup> "A servant or deputy, quatenus such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrongdoer."<sup>83</sup> A person may become a wrongdoer, however, by wrongful neglect as well as by

WEBER, 47 Mich. 569, 11 N. W. 389, Powell, Cas. Agency, 330 (1882); Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25 (1884); Hedin v. Minneapolis Medical & Surgical Institution, 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628 (1895).

<sup>80</sup> Attorney General v. Corporation of Leicester, 7 Beav. 176, 49 Rep. 1031 (1844).

<sup>81</sup> Ante, § 130.

<sup>82</sup> Story, Ag. § 308.

<sup>83</sup> Per Holt, C. J., in Lane v. Cotton, 12 Mod. 472, at page 488, 88 Rep. 1458 (13 Wm. III).

Accord: Tippecanoe Loan & Trust Co. v. Jester, 180 Ind. 357, 101 N. E. 915, L. R. A. 1915E, 721 (1913).

wrongful act—that is, by omitting to perform a duty which he owes to a third person—and in such case, in spite of the fact that he is a deputy, an action lies against him for his wrongful neglect or default, not *quatenus* a deputy, but as a wrongdoer. Thus an agent is not liable to a third person because he fails to carry out his contract with his principal, and the latter is the only person who can maintain an action against him for *that* nonfeasance;<sup>84</sup> but, if he enters upon performance, and in doing some acts fails to exercise such reasonable care as the nature of the act demands, to the injury of a third person, he is liable therefor.<sup>85</sup> For example, where an agent employed to manage a tenement directed the city water to be let on, but failed to see that the pipes had been left in proper condition, and in consequence of a faucet being open and the sink clogged water overflowed, to the injury of a tenant below, it was held that the agent was liable to the latter. “The defendant’s omission to examine the state of the pipes,” said the court, “was a nonfeasance. \* \* \* As the facts are, the nonfeasance caused the act done to be a misfeasance. But from what did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a nonfeasance.”<sup>86</sup> And so, where the superintendent of a manufacturing establishment and other

<sup>84</sup> Denny v. Manhattan Co., 2 Denio (N. Y.) 115; *Id.*, 5 Denio, 639 (N. Y. 1846); Reid v. Humber, 49 Ga. 207 (1873); Feltus v. Swan, 62 Miss. 415 (1884).

Cf. Murray v. Cowherd, 148 Ky. 591 147 S. W. 6, 40 L. R. A. (N. S.) 617 (1912), and comment thereon in 26 Harv. Law Rev. 174.

<sup>85</sup> Bell v. Josselyn, 69 Mass. (3 Gray) 309, 63 Am. Dec. 741 (1855); Phelps v. Wait, 30 N. Y. 78 (1864); Horner v. Lawrence, 37 N. J. Law, 46 (1874); Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437 (1881); Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911 (1895); Kimbrough v. Boswell, 119 Ga. 201, 45 S. E. 977 (1903); HAGERTY v. MONTANA, ETC., CO., 38 Mont. 69, 98 Pac. 643, 25 L. R. A. (N. S.) 356, Powell, Cas. Agency, 331 (1908); Consol. Gas Co. v. Connor, 114 Md. 140, 78 Atl. 725, 32 L. R. A. (N. S.) 809 (1910). See Jaggard, *Torts*, 286–291.

<sup>86</sup> Bell v. Josselyn, 69 Mass. (3 Gray) 309, 63 Am. Dec. 741 (1855).

agents and servants of the corporation negligently placed a tackle block so that it fell and injured the plaintiff, it was held that they were liable. "If the agent once actually undertakes and enters upon the execution of a particular work," said Gray, C. J., "it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequences of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability. \* \* \* This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly. \* \* \* The plaintiff's action is not founded on any contract. \* \* \* The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby."<sup>87</sup>

It must be remembered that it is only for neglect of a duty which is imposed upon him as a member of society that the agent is liable to third persons. Thus, where an agent is charged with the management of a house and with the duty of keeping it in repair, his duty is solely to his principal, and consequently he is not liable to a third person who is injured by accident caused by his failure in that regard.<sup>88</sup> It must be conceded, however, that there is a tendency to ignore this distinction in such cases, and to hold agents in charge of property to a peculiar responsibility.<sup>89</sup> Thus an agent was held liable to a person injured

<sup>87</sup> Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437 (1881).

<sup>88</sup> Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456 (1882).

An agent in charge of a plantation is not liable to the owner of an adjoining plantation for damage resulting from malicious neglect and refusal to keep open a drain which it was his duty as such agent to keep open. Feltus v. Swan, 62 Miss. 415 (1884).

An agent charged with the duty of superintending the erection on his principal's premises of a grand stand for a football game was not liable to persons injured by his negligence in permitting a defective structure. Van Antwerp v. Linton, 89 Hun, 417, 35 N. Y. Supp. 318 (1895), affirmed 157 N. Y. 716, 53 N. E. 1133 (1899).

<sup>89</sup> Ellis v. McNaughton, 76 Mich. 237, 42 N. W. 1113, 15 Am. St.

by his failure to keep in repair premises of which he had been given control.<sup>90</sup>

An agent is not, as a rule, liable to third persons for loss or injury caused by the wrongful act or omission of a sub-agent, or coagent, unless he authorized or participated therein.<sup>91</sup> In cases of libel, however, a stricter rule prevails, and the manager of a newspaper is equally liable with the proprietor or publisher for the publication of a libelous article, whether he knows of the publication or not, since it is his business to know.<sup>92</sup>

#### LIABILITY OF T. TO A.—WHERE A. HAS INTEREST IN SUBJECT-MATTER

138. An agent may sue T. in his own name on a contract made by him on behalf of his principal, when he has a special property in or lien upon the subject-matter of the contract.

The liability of T. to A. is covered for the most part by the previous discussion. Where A. has acted for an undisclosed P., or where, P. being disclosed, from the form of the contract it is treated as A.'s contract, such liability of T. to A. exists.<sup>93</sup>

Rep. 308 (1889); *Mayer v. Building Co.*, 104 Ala. 611, 16 South. 620, 28 L. R. A. 433, 53 Am. St. Rep. 88 (1894).

<sup>90</sup> *Campbell v. Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503 (1873); *Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504 (1890), in which cases, however, the agent let premises in dangerous condition, promising to repair. *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491, 59 L. R. A. 802, 94 Am. St. Rep. 848 (1902), and comment thereon in 1 Mich. Law Rev. 315.

<sup>91</sup> *Stone v. Cartwright*, 6 T. R. 411, 101 Rep. 622 (1795); *Brown v. Lent*, 20 Vt. 529 (1848); *Cargill v. Bower*, L. R. 10 Ch. D. 502 (1878).

<sup>92</sup> *Nevin v. Spieckemann*, 4 Atl. 497 (Pa. 1886); *Smith v. Utley*, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620 (1896).

<sup>93</sup> *Cooke v. Wilson*, 1 C. B. (N. S.) 153, 140 Rep. 65 (1856); *Albany & R. Iron & Steel Co. v. Lundberg*, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982 (1887); *Ludwig v. Gillespie*, 105 N. Y. 653, 11 N. E. 835 (1887); *Pelton v. Baker*, 158 Mass. 349, 33 N. E. 394 (1893).

The agent may have such a special interest in the subject-matter of the contract as to entitle him to sue in his own name.<sup>94</sup> A factor,<sup>95</sup> or an auctioneer,<sup>96</sup> has a special property in the goods, and hence may sue in his own name. A broker, on the other hand, having no such special property, is not entitled to sue unless he contracts personally, or unless under the circumstances of the case he does in fact have such special property.<sup>97</sup> If the agent has, as against his principal, a right of lien in the subject-matter, his right to sue on the contract has priority, during the existence of his claim, to that of the principal.<sup>98</sup>

#### LIABILITY OF T. TO A.—WHEN PROFESSED AGENT IS REAL PRINCIPAL

139. When a person who contracts professedly as agent for a named principal is in fact the real principal, he may sue on the contract if performance, in whole or in part, has been accepted by the other party with knowledge that he is the real principal. When a person who contracts professedly as agent of an unnamed principal is in fact the real principal, he may (perhaps) sue on the contract, although there has been no recognition of him in the character of principal by the other party.

<sup>94</sup> *Drinkwater v. Goodwin*, 1 Cowp. 251, 98 Rep. 1070 (1775); *Atkins v. Amber*, 2 Esp. 493 (1796); *Simon v. Trummer*, 57 Or. 153, 110 Pac. 786 (1910).

<sup>95</sup> *Drinkwater v. Goodwin*, 1 Cowp. 251, 98 Rep. 1070 (1775); *Toland v. Murray*, 18 Johns. 24 (N. Y. 1820); *Groover v. Warfield*, 50 Ga. 644 (1874).

<sup>96</sup> *Williams v. Millington*, 1 H. Bl. 81, 126 Rep. 49 (1788); *Hulse v. Young*, 16 Johns. 1 (N. Y. 1819); *Minturn v. Main*, 7 N. Y. 220 (1852); *Beller v. Block*, 19 Ark. 566 (1858).

<sup>97</sup> *White v. Chouteau*, 10 Barb. 202 (N. Y. 1850); *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519 (1868); *Fairlie v. Fenton*, L. R. 5 Ex. 169 (1870).

<sup>98</sup> *Drinkwater v. Goodwin*, 1 Cowp. 251, 98 Rep. 1070 (1775); *Bowstead, Dig. Ag.* (1919 Ed.) art. 128.

Cf. *Moline Malleable Iron Co. v. Iron Co.*, 83 Fed. 66, 27 C. C. A. 442 (1897).

Where a contract is made by an agent in the name of his principal, as a rule the principal, and he only, may sue thereon. The agent is not a party to the contract, and consequently may not maintain an action.<sup>99</sup> And where one who professes to contract as agent of a named principal is in fact the real principal, it would seem that the same rule should apply, and that, the contract being expressly with another person, the person contracting as agent could not maintain an action in whatsoever character.<sup>1</sup> Where the character and credit of the person who is named as principal may reasonably be considered as a material ingredient in the contract, it is conceded that the professed agent cannot, at least when the other party has not recognized him as the real principal, show himself to be such and maintain an action, and it is probably true that in all executory contracts, unless part performance has been accepted with knowledge of the true principal, the rule is the same.<sup>2</sup> On the other hand, it has been held that when the plaintiff, professedly as agent for a named principal, contracted in writing to sell goods, and the buyer, with notice that he was the real principal, accepted and paid for part of the goods, the plaintiff could maintain an action for non-acceptance of the residue.<sup>3</sup>

A distinction has been drawn between cases where the professed agent contracts as agent of a named and of an unnamed principal. In the latter case it has been held that, since the other party cannot have contracted in reliance upon the unnamed principal personally, the ostensible agent

<sup>99</sup> See cases in footnote 2, p. 315, *supra*.

<sup>1</sup> *Hollman v. Pullin*, 1 Cab. & E. 254 (1884); *Martin v. Hemphill*, 221 S. W. 333 (Tex. Civ. App. 1920).

<sup>2</sup> *Rayner v. Grote*, 15 M. & W. 359, 153 Rep. 888 (1846).

It has been intimated, however, that the professed agent can sue, if before action he gives notice that he is the real principal. *Bickerton v. Burrell*, 5 M. & S. 383, 105 Rep. 1091 (1816); *Foster v. Smith*, 42 Tenn. (2 Cold.) 474, 88 Am. Dec. 604 (1865).

<sup>3</sup> *Rayner v. Grote*, 15 M. & W. 359, 153 Rep. 888 (1846); *Whiting v. William H. Crawford Co.*, 93 Md. 390, 49 Atl. 615 (1901).

can sue upon the contract, although there has been no recognition of him by the other party as real principal.<sup>4</sup> But, where the contract is within the statute of frauds, it has been held that a written contract in such form is not a sufficient memorandum, so as to entitle the professed agent to sue.<sup>5</sup>

<sup>4</sup> *Schmaltz v. Avery*, 16 Q. B. 655, 117 Rep. 1031 (1851).

In that case Schmaltz & Co. signed a charter party as "agents of the freighter," a clause being inserted limiting their liability in view of the "charter being concluded on behalf of another party." It was held that Schmaltz & Co., who were themselves the freighters, might sue upon the contract. "The names of the supposed freighters, not being inserted," said Patteson, J., "no inducement to enter into the contract from the supposed solvency of the freighters can be surmised. \* \* \* There is no contradiction of the charter party if the plaintiff can be considered as filling two characters, namely, those of agent and principal. A man cannot, in strict propriety of speech, be said to be the agent to himself. Yet, in a contract of this description, we see no absurdity in saying that he might fill both characters; that he might contract as agent for the freighter, whoever that freighter might turn out to be, and might still adopt that character of freighter if he chose. There is nothing in the argument that the plaintiff's responsibility is expressly made to cease 'as soon as the cargo is shipped,' for that limitation plainly applies only to his character as agent; and, being real principal, his responsibility would unquestionably continue after the cargo was shipped."

<sup>5</sup> Where a broker signed a contract note, professedly as agent for an undisclosed principal, acting in fact upon his own behalf, of which the other party was not aware, it was held that he could not sue on the contract, because there was no memorandum to satisfy the statute of frauds, and some of the judges laid down that he could not sue because the contract was not with him. *Sharman v. Brandt*, L. R. 6 Q. B. 720 (1871).

But where an agent signed a memorandum with the name of his principal, and the party sought to be charged, who had also signed, supposed he was contracting with the agent personally, and that the signature was his own name, it was held that the memorandum satisfied the statute, and that, if the defendant sought to defend on the ground that his supposition was caused by fraud, the question was for the jury, and could not be assumed as a basis for a ruling that the contract was void. *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54 (1867).

**LIABILITY OF T. TO A.—MONEY HAD AND RECEIVED**

140. When an agent pays money for his principal under a mistake of fact or for a consideration which fails, he may maintain an action for its recovery.

"Where a man pays money by his agent, which ought not to have been paid, either the agent or the principal may bring an action to recover it back. The agent may, from the authority of the principal, and the principal may, as proving it to have been paid by his agent."<sup>6</sup> Thus the agent may recover money paid under an illegal contract, but in ignorance of the illegality,<sup>7</sup> or paid under inducement of fraud,<sup>8</sup> or paid to a third person in exchange for a counterfeit bill, although there was no authority to exchange such money with such third person,<sup>9</sup> or paid to the third person by mistake.<sup>10</sup>

**LIABILITY OF T. TO A.—TORTS**

141. An agent, who is in the possession of or has a special property in the goods of his principal, may maintain an action against a third person for trespass or conversion.

The liability of third persons to the agent for torts is mainly confined to cases where his right of possession is

<sup>6</sup> Per Lord Mansfield in Stevenson v. Mortimer, 2 Cowp. 805, at page 806, 98 Rep. 1372 (1778).

Accord: Meinshausen v. American Shipping Co., 197 Ill. App. 620 (1916).

<sup>7</sup> Oom v. Bruce, 12 East, 225, 104 Rep. 87 (1810).

<sup>8</sup> Holt v. Ely, 1 E. & B. 795, 118 Rep. 634 (1853).

<sup>9</sup> Kent v. Bornstein, 94 Mass. (12 Allen) 342 (1866).

<sup>10</sup> Parks v. Fogleman, 97 Minn. 157, 105 N. W. 560, 4 L. R. A. (N. S.) 363, 114 Am. St. Rep. 703 (1906); Bank of Cal. v. Mortgage Co., 179 Pac. 853 (Wash. 1919).

invaded.<sup>11</sup> A factor or other agent, who is in possession of the goods of his principal, may maintain an action of trespass or trover<sup>12</sup> for injuries affecting his possession, and in case of conversion may recover the full value.<sup>13</sup> If an agent has a special property, as a factor to whom goods have been consigned, it is not essential to his right of recovery that he be in actual possession when his right is invaded.<sup>14</sup>

An action lies on behalf of an employee against a person who maliciously and without justifiable cause induces his employer to discharge him.<sup>15</sup>

<sup>11</sup> Story, Ag. § 416.

<sup>12</sup> Burton v. Hughes, 2 Bing. 173, 176, 130 Rep. 272 (1824); Robinson v. Webb, 74 Ky. (11 Bush.) 464 (1875); Moore v. Robinson, 2 B. & Ad. 817, 109 Rep. 1346 (1831).

Actual possession, pure and simple, will sustain an action for trespass. Jaggard, Torts, 670; Laing v. Nelson, 41 Minn. 521, 43 N. W. 476 (1889); TAYLOR v. HAYES, 63 Vt. 475, 21 Atl. 610, Powell, Cas. Agency, 335 (1891).

<sup>13</sup> Mechanics' & Traders' Bank v. Bank, 60 N. Y. 40 (1875).

<sup>14</sup> Fowler v. Down, 1 B. & P. 44, 47, 126 Rep. 769 (1797); Rooth v. Wilson, 1 B. & Ald. 59, 106 Rep. 22 (1817); Fitzhugh v. Wiman, 9 N. Y. 559 (1854); Beyer v. Bush, 50 Ala. 19 (1873).

<sup>15</sup> Chipley v. Atkinson, 23 Fla. 206, 1 South, 934, 11 Am. St. Rep. 367 (1887); Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496 (1897); MORAN v. DUNPHY, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289, Powell, Cas. Agency, 337 (1900).

## CHAPTER XV

### DUTIES OF AGENT TO PRINCIPAL

- Duties Owed by Agent to Principal—
- 142. Implications in Contract.
  - To Obey Instructions—
    - General Rule.
    - Exceptions.
  - 145. To Exercise Skill, Care, and Diligence.
  - 146. To Act in Good Faith.
  - 147. To Account.

### DUTIES OWED BY AGENT TO PRINCIPAL—IMPLICATIONS IN CONTRACT

142. Every contract of employment, not expressly eliminating such duties, imposes upon the agent certain duties as to obedience, skill, care, diligence, good faith, and accounting.

The obligations between the principal and agent are determined by the express terms of the contract of employment and such implied terms thereof as may be reasonably added from existent usages.<sup>1</sup> Particular usages frequently expand these implications as to certain classes of agents, such as factors and brokers.<sup>2</sup> Certain duties, however, are so generally regarded as involved in the relation that they are implied terms of every contract of employment, except so far as they may be modified or eliminated by the express agreement of the parties. The extent of the duty of the agent to act in person has been considered.<sup>3</sup> The remaining general duties of the agent provide the topic of this chapter. They may be classified into four general duties, namely: (1) The duty to obey instructions;<sup>4</sup> (2)

<sup>1</sup> See sections 12, 14, and 15, supra.

<sup>2</sup> See section 24, supra.

<sup>3</sup> See chapter X, supra.

<sup>4</sup> Sections 143 and 144, infra.

the duty to exercise skill, care, and diligence;<sup>5</sup> (3) the duty to act in good faith;<sup>6</sup> and (4) the duty to account and pay over.<sup>7</sup>

#### DUTIES OWED BY AGENT TO PRINCIPAL—TO OBEY INSTRUCTIONS—GENERAL RULE

143. Except in the cases discussed in section 144, it is the duty of the agent to obey the instructions of his principal, and for any breach of such duty the agent is liable in damages for the resulting loss.

Every agent is bound to execute the orders of his principal whenever, for a valuable consideration, he has undertaken, expressly or by implication, to perform them. It is his first duty to pursue the terms of his authority and to adhere strictly to his instructions. The duty of the agent to obey the instructions given by the principal with reference to the agency is inherent in the very nature of the relation. His right to act at all in the capacity of agent comes solely from the authority of the principal, and, as between them, the authority is inseparable from the instructions. A voluntary deviation by the agent from his instructions is at his peril, and, subject to the exceptions later discussed,<sup>8</sup> renders him liable to the principal for any resulting loss,<sup>9</sup> unless the principal, with full knowledge of the facts, ratifies his acts.<sup>10</sup> It is no defense that the course

<sup>5</sup> Section 145, *infra*.

<sup>6</sup> Section 146, *infra*.

<sup>7</sup> Section 147, *infra*.

<sup>8</sup> Section 144, *infra*.

<sup>9</sup> *WIIITNEY v. EXPRESS CO.*, 104 Mass. 152, 6 Am. Rep. 207, Powell, Cas. Agency, 340 (1870); *Adams v. Robinson*, 65 Ala. 586 (1880); *Butts v. Phelps*, 79 Mo. 302 (1883); *Dazey v. Roleau*, 111 Ill. App. 367 (1903); *Brit. Amer. Ins. Co. v. Wilson*, 77 Conn. 559, 60 Atl. 293 (1905); *Minn. Trust Co. v. Mather*, 181 N. Y. 205, 73 N. E. 987 (1905); *Case Threshing M. Co. v. Folger*, 136 Wis. 468, 117 N. W. 944 (1908); *Coyne Bros. v. Feazel*, 129 Ark. 163, 195 S. W. 391 (1917); *General R. Mfg. Co. v. Greensburg T. & T. Co.*, 71 Pa. Super. Ct. 373 (1919).

<sup>10</sup> Sections 59 and 64, *supra*.

pursued was reasonable or that it was intended for the benefit of the principal.<sup>11</sup> Nor, if loss results, will the agent be heard to say that the deviation was immaterial, unless he can show that the deviation did not contribute to the loss.<sup>12</sup>

The instructions may be implied as well as express, for the intention of the principal may be manifested by the nature and objects of the transaction, or may be inferable from the previous course of dealing between the parties, or from other circumstances.<sup>13</sup> And when a trade usage or custom prevails, an intention on the part of the principal that it is to govern the manner of performance may often be implied. This implication will not prevail in the face of express instructions which are inconsistent with it.<sup>14</sup> But in the absence of express instructions it is to be implied that the principal intends the agent to act according to usage; and even where the principal has given express instructions, they may be interpreted in the light of usage, so far as it is not in conflict with them.<sup>15</sup> Thus an agent instructed to collect or to sell must ordinarily col-

<sup>11</sup> *Butler v. Knight*, L. R. 2 Ex. 109 (1867); *Rechtscherd v. Bank*, 47 Mo. 181 (1870); *Coker v. Ropes*, 125 Mass. 577 (1878).

<sup>12</sup> *Walker v. Walker*, 52 Tenn. (5 Heisk.) 425 (1871). Where a principal directed his agent to remit by mail in bills of \$50 or \$100, and the agent remitted in bills of \$5, \$10, and \$20, which were never received, the agent was liable for the full amount. "It is not sufficient," said Lewis, C. J., "that the deviation was not material, if it appears that the party giving the instructions regarded them as material, unless it be shown affirmatively that the deviation in no manner contributed to the loss. This may be a difficult task in a case like the present, but the defendant voluntarily assumed it when he substituted his own plan for that prescribed by the plaintiff." *Wilson v. Wilson*, 26 Pa. 393 (1856).

<sup>13</sup> See *supra*, §§ 10–15, as to construction of authority.

<sup>14</sup> *Parsons v. Martin*, 77 Mass. (11 Gray) 111 (1858); *Hutchings v. Ladd*, 16 Mich. 493 (1868); *Robinson v. Mollett*, L. R. 7 H. L. 802 (1875); *Robinson Machine Works v. Vorse*, 52 Iowa, 207, 2 N. W. 1108 (1873); *Franklin Ins. Co. v. Sears*, 21 Fed. 290 (C. C. 1884). See section 10, *supra*.

<sup>15</sup> See section 15, *supra*.

lect or receive payment in cash, for such an intention on the part of the principal is to be implied;<sup>16</sup> and if expressly instructed to collect in cash no usage will authorize him to disregard that instruction;<sup>17</sup> but if not expressly instructed to that effect, and it is the usage of the particular business in which he is employed to accept a check in payment or to extend credit, he has implied authority so to do.<sup>18</sup>

If the instructions are ambiguous, so as to be susceptible of two meanings, and the agent complies with them according to his understanding of their meaning, he is not liable for failure to understand them as the principal intended and to act according to that understanding.<sup>19</sup>

Any failure on the part of the agent to obey the orders or to adhere to the instructions of his principal is a breach of duty, which entitles the principal to recover at least nominal damages.<sup>20</sup> If the disobedience results in loss to the principal, he is entitled to recover substantial damages, measured by the amount of the loss. It must, of course, appear that a loss has actually resulted from the breach. For example, there can be no recovery of substantial damages for failure to insure a ship, if the principal had no insurable interest, or if the ship, in the course of the voyage, has so deviated that the insurance, had it been effected, would have been rendered void.<sup>21</sup> The loss must be the

<sup>16</sup> See cases in footnotes 7-10, p. 82, in section 28, supra.

<sup>17</sup> Catlin v. Smith, 24 Vt. 85 (1851); Hall v. Storrs, 7 Wis. 253 (1858).

Cf. cases in footnote 10, p. 82, in section 28, supra.

<sup>18</sup> Russell v. Hankey, 6 T. R. 12, 101 Rep. 409 (1794). See, also, Pape v. Westacott, [1894] 1 Q. B. 272, and cases in footnote 28, p. 69, in section 24, supra.

<sup>19</sup> Falsken v. Falls City State Bank, 71 Neb. 29, 98 N. W. 425 (1904), and cases in footnote 85, p. 31, in section 13, supra.

<sup>20</sup> Frothingham v. Everton, 12 N. H. 239 (1841); Blot v. Bolceau, 3 N. Y. 78, 51 Am. Dec. 345 (1849); Adams v. Robinson, 65 Ala. 586 (1880); Elam v. Smithdeal R. & Ins. Co., 182 N. C. 599, 109 S. E. 632, 18 A. L. R. 1210 (1921).

<sup>21</sup> Alsop v. Coit, 12 Mass. 40 (1815); CHESHIRE & CO. v.

natural and proximate result of the disobedience, but it need not be the immediate result. Thus, where the loss is immediately caused by an accident or the wrongdoing of a third person, if the property or interest which is the subject of the instructions would not have been exposed to such risk but for the agent's disobedience, the loss is attributable to the disobedience as the proximate cause.<sup>22</sup>

The following cases will serve to illustrate the nature of the agent's duty to obey instructions and the extent of his liability for disobedience: If an agent is instructed to insure property, and neglects to do so, he is liable to the principal for its value in the event of its being lost.<sup>23</sup> If an agent is instructed to sell shares when they reach a certain price, and fails to do so, he is liable for the difference between the value of the shares and the price which might have been so obtained.<sup>24</sup> If an agent, being directed to warehouse goods at a certain place, warehouses them at a different place,<sup>25</sup> or, being directed to ship goods by a designated carrier or at a certain time, ships by another carrier or at another time,<sup>26</sup> and the goods are lost or de-

VAUGHAN BROS. & CO. [1920] 3 K. B. 240, Powell, Cas. Agency, 170, and comment thereon in 34 Harv. L. R. 432.

<sup>22</sup> Wilson v. Wilson, 26 Pa. 393 (1856); Cave v. Lougee & Zimmer, 134 Ga. 135, 67 S. E. 667 (1910).

<sup>23</sup> De Tastett v. Croussillat, 2 Wash. C. C. 132, Fed. Cas. No. 3,828 (1807); Sawyer v. Mayhew, 51 Me. 398 (1863); Shoenfeld v. Fleisher, 73 Ill. 404 (1874); American Book Co. v. Archer, 170 Ky. 744, 186 S. W. 672 (1916).

So, if an agent of an insurance company fails to cancel a policy as directed, he is liable to the company for the amount it is compelled to pay thereon. Franklin Ins. Co. v. Sears, 21 Fed. 290 (C. C. 1884); Phoenix Ins. Co. v. Frissell, 142 Mass. 513, 8 N. E. 348 (1886); Northern Assur. Co. v. Borgelt, 67 Neb. 282, 93 N. W. 226 (1903); QUEEN CITY FIRE INS. CO. v. FIRST NAT. BANK, 18 N. D. 603, 120 N. W. 545, 22 L. R. A. (N. S.) 509, Powell, Cas. Agency, 342 (1909).

<sup>24</sup> Bertram v. Godfray, 1 Knapp, P. C. 381, 12 Rep. 364 (1830).

<sup>25</sup> Lilley v. Doubleday, 7 Q. B. D. 510 (1881). But where a factor neglected to sell cotton within a reasonable time after being instructed to sell, and it was destroyed by fire, the delay was not the proximate cause of the loss. Lehman v. Pritchett, 84 Ala. 512, 4 South. 601 (1887).

<sup>26</sup> Wilts v. Morrell, 66 Barb. 511 (N. Y. 1873).

stroyed while in the custody of the warehouseman or carrier, the agent is liable for their value. If an agent, being directed to forward a claim to a certain person for collection, sends it to another person, he thereby renders himself liable for any resulting loss.<sup>27</sup> If an agent, being instructed to remit money by draft, sends the money in a letter, which is lost,<sup>28</sup> or, being instructed to send the money by express, remits by check, which becomes worthless by insolvency of the maker,<sup>29</sup> the agent is liable for the loss. If an agent, being ordered to sell for cash, sells on credit or accepts a check or note in payment, he assumes responsibility for collection of the indebtedness.<sup>30</sup> If an agent is authorized to sell goods for a certain price and sells for a less price,<sup>31</sup> or is authorized to sell goods in one lot and sells a part,<sup>32</sup> he is liable for the resulting loss.

<sup>27</sup> Butts v. Phelps, 79 Mo. 302 (1883).

<sup>28</sup> Foster v. Preston, 8 Cow. 198 (N. Y. 1828); Kerr v. Cotton, 23 Tex. 411 (1859).

<sup>29</sup> Walker v. Walker, 52 Tenn. (5 Heisk.) 425 (1871).

<sup>30</sup> Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467 (1836); Clark v. Roberts, 26 Mich. 506 (1873); Harlan v. Ely, 68 Cal. 522, 9 Pac. 947 (1886); Pape v. Westacott, [1894] 1 Q. B. 272.

<sup>31</sup> Sarjeant v. Blunt, 16 Johns. 74 (N. Y. 1819).

If the agent shows that at the time of sale and ever since the goods were worth no more than the price at which they were sold, the principal can recover only nominal damages. Frothingham v. Everton, 12 N. H. 239 (1841); Blot v. Boiceau, 3 N. Y. 78, 51 Am. Dec. 345 (1849); Dalby v. Stearns, 132 Mass. 230 (1882).

But in Switzer v. Connell, 11 Mo. 88 (1847), it was held that the agent is responsible to the principal for the price fixed. Reynolds v. Rogers, 63 Mo. 17 (1876). However, there was evidence that this price was the reasonable value of such articles.

The measure of damages in an action against a broker for selling stocks in violation of orders is the highest intermediate value between the sale and a reasonable time after the owner has received notice of it to enable him to replace the stocks. Galigher v. Jones, 129 U. S. 192, 9 Sup. Ct. 335, 32 L. Ed. 658 (1889). See Sedgwick, Dam. (1912 Ed.) § 828.

Where an agent converts money which he is directed to invest in a particular security, which subsequently acquires great value, he is accountable for the value of such article. Short v. Skipwith, 1 Brock. 103, Fed. Cas. No. 12,809 (1806).

<sup>32</sup> Levison v. Balfour, 34 Fed. 382 (C. C. 1888). Whether an order

If an agent parts with the possession of his principal's goods contrary to his instructions, he may be liable for conversion as well as in contract.<sup>33</sup> Thus, where an agent, who had received a note for negotiation with instructions not to let it go out of his reach without receiving the money, delivered it to another to get it discounted, who appropriated the avails, it was held that the agent was liable for conversion.<sup>34</sup> So, when a factor in Buffalo was directed to sell wheat at a specified price on a particular day, or to ship it to New York, and did not sell or ship on that day, but sold it on the next day at the price named, it was held that the sale was a conversion.<sup>35</sup> On the other hand, it is held that an agent is not liable in trover for selling goods at a price below instructions.<sup>36</sup> "The result of the authorities," said Church, C. J.,<sup>37</sup> "is that, if the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion but if he parts with it in accordance with his authority, although at a less price, \* \* \* he is not liable for a conversion of the property, but only in an action on the case for misconduct."

to buy 100 bales of cotton must be executed as a whole turns upon the meaning in which the order is to be understood in the light of the circumstances. *Johnston v. Kershaw*, L. R. 2 Ex. 82 (1867).

<sup>33</sup> *Syeds v. Hay*, 4 T. R. 260, 100 Rep. 1008 (1791); *Spencer v. Blackman*, 9 Wend. 167 (N. Y. 1832); *Farrand v. Hurlbut*, 7 Minn. 477 (Gil. 383) (1862).

<sup>34</sup> *LAVERTY v. SNETHEN*, 68 N. Y. 522, 23 Am. Rep. 184, Powell, Cas. Agency, 346 (1877).

<sup>35</sup> *Scott v. Rogers*, 31 N. Y. 676 (1864).

<sup>36</sup> *Sarjeant v. Blunt*, 16 Johns. 74 (N. Y. 1819).

<sup>37</sup> *LAVERTY v. SNETHEN*, 68 N. Y. 523, at page 527, 23 Am. Rep. 184, Powell, Cas. Agency, 346 (1877).

### DUTIES OWED BY AGENT TO PRINCIPAL—TO OBEY INSTRUCTIONS—EXCEPTIONS

144. To the general duty described in section 143 there are these exceptions:

- (1) A gratuitous agent is under no duty to P., by reason of such agency, until he enters upon the performance of his task.
- (2) When obedience becomes impossible without the fault of the agent, or where an unforeseen emergency requires the agent to act contrary to his instructions, and communication with the principal is impracticable, the agent is excused.
- (3) When obedience would impair the agent's security for advances made upon goods consigned to him for sale, the agent is excused.
- (4) When obedience would require the agent to perform an illegal or immoral act, the agent is excused.

A person who has undertaken gratuitously to perform an act on behalf of another is not bound to perform it, for his promise is without consideration. But, although he is not liable for nonfeasance, he is liable for misfeasance.<sup>38</sup> If he enters upon performance, he thereby impliedly undertakes and is bound to adhere to his instructions, and if he departs from them he is liable to the principal for any resulting loss.<sup>39</sup>

In cases of unforeseen emergency and extreme neces-

<sup>38</sup> *THORNE v. DEAS*, 4 Johns. 84, Powell, Cas. Agency, 1 (N. Y. 1809); *Dartnall v. Howard*, 4 B. & C. 345, 107 Rep. 1088 (1825); *Balfe v. West*, 13 C. B. 466, 138 Rep. 1281 (1853).

Cf. *Smedes v. Bank*, 20 Johns. 372, 380 (N. Y. 1823). See cases in footnote 66-72, pp. 381-383, *infra*.

<sup>39</sup> *Walker v. Smith*, 1 Wash. C. C. 152, Fed. Cas. No. 17,086 (U. S. 1804); *Opie v. Serrill*, 6 Watts & S. 264 (Pa. 1843); *Williams v. Higgins*, 30 Md. 404 (1869); *Spencer v. Towles*, 18 Mich. 9 (1869); *Jenkins v. Bacon*, 111 Mass. 373, 15 Am. Rep. 33 (1873); *Odegaard v. Haugland*, 40 N. D. 547, 169 N. W. 170 (1918).

sity the agent may be justified in departing from his instructions, upon the ground that the instructions are not applicable to the emergency, and that authority is to be implied to act, in the exercise of a sound discretion, as the occasion demands.<sup>40</sup>

Thus, if goods are perishable, and are in immediate danger of deterioration, and a sale is necessary to prevent a total or a partial loss, and there is no opportunity to communicate with the principal, the agent may deviate from his instructions as to the time or price of sale.<sup>41</sup> So, an agent instructed to place funds or property in a certain place, if there is reasonable ground of apprehension for their safety if so deposited, may be justified in depositing them elsewhere.<sup>42</sup>

A fortiori, if without the agent's fault performance becomes impossible, he will be excused for failure to comply with his instructions.<sup>43</sup>

Another exception exists in favor of a factor who has made advances. As a rule a factor, like any other agent,

<sup>40</sup> *Dusar v. Perit*, 4 Bin. 361 (Pa. 1812); *Judson v. Sturges*, 5 Day 556 (Conn. 1813); *Forrestier v. Bordman*, 1 Story, 43 Fed. Cas. No. 4,945 (U. S. 1839); *Foster v. Smith*, 42 Tenn. (2 Cold.) 474, 88 Am. Dec. 604 (1865); *Bernard v. Maury*, 61 Va. (20 Grat.) 434 (1871); *Bartlett v. Sparkman*, 95 Mo. 136, 8 S. W. 406, 6 Am. St. Rep. 35 (1888); *Story, Ag.* § 193 ff.

Where hay, which was sent during the war to New Orleans for sale, was seized by the military authorities of the United States, who refused to pay for it, except in government certificates of indebtedness, which were worth only 93 per cent. of their face value, and the consignees, without communicating with the consignors, but according to the custom of factors there, accepted the certificates and afterwards sold them, it was held that their conduct was justified. *Greenleaf v. Moody*, 95 Mass. (13 Allen) 363 (1866).

<sup>41</sup> *Jervis v. Hoyt*, 2 Hun, 637 (N. Y. 1874). But, where a cargo of wheat sank in three feet of water, the agent, although authorized to employ means to save it, had no authority to sell it. *Foster v. Smith*, 42 Tenn. (2 Cold.) 474, 88 Am. Dec. 604 (1865).

<sup>42</sup> *Drummond v. Wood*, 2 Caines, 310 (N. Y. 1805).

<sup>43</sup> *Greenleaf v. Moody*, 95 Mass. (13 Allen) 363 (1866); *Weakley v. Pearce*, 52 Tenn. (5 Heisk.) 401 (1871).

Cf. *Milbank v. Dennistoun*, 21 N. Y. 386 (1860).

is bound to obey the orders of his principal; but if he has made advances on account of the consignment, by which he acquires a special property therein, he has a right, unless there is an agreement to the contrary, to sell so much of the goods as may be necessary to reimburse such advances without regard to instructions, provided the principal fails to repay the advances upon reasonable notice, and, if he is directed to make a sale at a time or for a price which would impair his security, he may refuse to obey the instructions to sell.<sup>44</sup>

If the instructions require the agent to perform an illegal or immoral act, he is not liable for failure to perform it, for the very agreement to perform such an act is void.<sup>45</sup> Upon much the same principle, if an agent is employed to make a contract for his principal which would be void for illegality, the agent is not liable for failure to make the contract, since the principal could have acquired no rights under it, and consequently suffers no legal damage by the fact that it was not made.<sup>46</sup>

<sup>44</sup> Parker v. Brancker, 39 Mass. (22 Pick.) 40 (1839); Phillips v. Scott, 43 Mo. 86, 97 Am. Dec. 309 (1868); Feild v. Farrington, 77 U. S. (10 Wall.) 141, 19 L. Ed. 923 (1870); Weed v. Adams, 37 Conn. 378 (1870); Hilton v. Vanderbilt, 82 N. Y. 591 (1880); Davis v. Kobe, 36 Minn. 214, 30 N. W. 662, 1 Am. St. Rep. 663 (1886); Lockett v. Baxter, 3 Wash. T. 350, 19 Pac. 23 (1888); Gordon & Co. v. Cobb, 4 Ga. App. 49, 60 S. E. 821 (1908).

Contra: Smart v. Sandars, 5 C. B. 895, 136 Rep. 1132 (1848); De Comas v. Prost, 3 Moore, P. C. (N. S.) 158, 16 Rep. 59 (1865).

<sup>45</sup> Bexwell v. Christie, Cowp. 395, 98 Rep. 1150 (1776); Webster v. De Tastet, 7 T. R. 157, 101 Rep. 908 (1797).

<sup>46</sup> Webster v. De Tastet, 7 T. R. 157, 101 Rep. 908 (1797); Cohen v. Kittell, L. R. 22 Q. B. D. 680 (1889).

**DUTIES OWED BY AGENT TO PRINCIPAL—TO EXERCISE SKILL, CARE, AND DILIGENCE**

145. It is the duty of the agent, whether acting for hire or gratuitously, to exercise in the performance of the agency such skill, care, and diligence as the nature of his undertaking, to be inferred from all the circumstances of the case, reasonably demands, and if he fails to do so he is liable in damages for any resulting loss.

The duty of the agent to be skillful, careful, and diligent is closely connected with his duty to obey instructions. By accepting the appointment the agent impliedly undertakes that he will exercise reasonable skill, care, and diligence in the performance of the agency. As a rule, it may be said that, where an agent receives compensation for his services, that degree of skill, care, and diligence is required, and suffices, which is ordinarily exercised by persons of common capacity and prudence engaged in similar transactions in the same community.<sup>47</sup> It is obvious, however, that the degree of skill, care, and diligence which is reasonable, and for which the agent undertakes, is a question of fact, depending, not only upon the nature of the act to be performed, but upon all the circumstances of the case, from which the mutual understanding of the parties and the undertaking of the agent are to be inferred, such as the instructions communicated, the usages of trade, and the customs of the particular business, the previous course of dealing between the parties, and the degree of skill which the agent professes.<sup>48</sup> Thus, if the transaction is of

<sup>47</sup> *Varnum v. Martin*, 32 Mass. (15 Pick.) 440 (1834); *Wright v. Banking Co.*, 16 Ga. 38 (1854); *Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316 (1856); *Whitney v. Martine*, 88 N. Y. 535 (1882); *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835 (1892); *Goodwin v. Kraft*, 23 Okl. 329, 101 Pac. 856 (1909); *Erickson v. Reine*, 139 Minn. 282, 166 N. W. 333 (1918).

<sup>48</sup> *Wilson v. Russ*, 20 Me. 421 (1841); *Johnson v. Martin*, 11 La. Ann.

a nature to require expert skill and knowledge, the agent impliedly undertakes, if there is nothing to indicate a different understanding, that he will exercise the skill and knowledge of an expert, and a degree of care and diligence based upon the skill and knowledge of an expert.<sup>49</sup> On the other hand, if the agent is not and does not profess to be an expert, and the principal, knowing that fact, nevertheless sees fit to employ him, no undertaking to exercise the skill and knowledge of an expert can be implied, nor will the agent be held to a higher standard of performance than that upon which the principal has reason to rely.<sup>50</sup> This subject will be further discussed in considering the duties in this respect of gratuitous agents, which, although often affected by the circumstance that such agents serve with-

27, 66 Am. Dec. 193 (1856); *Solomon v. Barker*, 2 F. & F. 726 (1862); *STEVENS v. WALKER*, 55 Ill. 151, Powell, Cas. Agency, 348 (1870); *Page v. Wells*, 37 Mich. 415 (1877); *Krafft v. Citizens' Bank*, 139 App. Div. 610, 124 N. Y. Supp. 214 (1910); *Paige v. Faure*, 229 N. Y. 114, 127 N. E. 898, 10 A. L. R. 649 (1920).

<sup>49</sup> *Crooker v. Hutchinson*, 1 Vt. 73 (1827); *Godefroy v. Dalton*, 6 Bing. 460, 130 Rep. 1357 (1830); *Varnum v. Martin*, 32 Mass. (15 Pick.) 440 (1834); *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388 (1853); physician, *Lee v. Walker*, L. R. 7 C. P. 121 (1872); *DE HART v. DE HART*, 70 N. J. Eq. 774, 67 Atl. 1074, Powell, Cas. Agency, 351 (1905).

A money lender by his business holds himself out as possessing competent skill to determine what reasonable care and prudence requires in lending for another. *McFarland v. McClees*, 5 Atl. 50 (Pa. 1886).

Where an insurance broker was informed that goods on which he was instructed to effect a policy were loaded at a prior port from that from which the risk was to commence, he was liable for effecting a policy in common form, "beginning the adventure \* \* \* from the loading," since such a policy attached only on goods loaded at the port which was the terminus a quo of the risk. "Insurance brokers are bound," said Gibbs, C. J., "to know that this is the law, and to act accordingly for the benefit of their employers. They are expected to display competent skill as well as diligence in their business." *Park v. Hamond*, 4 Camp. 344 (1815).

<sup>50</sup> *Felt v. School Dist.*, 24 Vt. 297 (1852); *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363 (1880).

"A metropolitan standard is not to be applied to a rural bar." Weeks, Attys. § 289.

out reward, are to be determined by the application of the same principles.

It follows that, if the agent has exercised reasonable skill, care, and diligence, he is not responsible for the consequences of his acts or omissions, although they result in loss which the exercise of a higher degree of these qualities might have prevented. He is not an insurer. If he has not been negligent, he is not liable for the loss of property by theft or fire.<sup>51</sup> In matters left to his discretion, if he has acted in good faith and with reasonable care, he is not responsible for mere errors of judgment.<sup>52</sup>

Substantially the same rules in respect to the damages recoverable by the principal are applicable in an action for negligence as in an action for failure to obey instructions.<sup>53</sup> In other words, the measure of damages is the amount of the loss naturally and proximately resulting from the breach of duty.<sup>54</sup>

A consideration in detail of what constitutes negligence upon the part of different classes of agents, such as factors, brokers, and attorneys, would involve a fuller discussion of the peculiar duties imposed upon them by law or

<sup>51</sup> *Johnson v. Martin*, 11 La. Ann. 27, 66 Am. Dec. 193 (1856); *Furber v. Barnes*, 32 Minn. 105, 19 N. W. 728 (1884).

<sup>52</sup> *Milbank v. Dennistoun*, 21 N. Y. 386 (1860); *Gettins v. Scudder*, 71 Ill. 86 (1873); *Long v. Pool*, 68 N. C. 479 (1873); *Stewart v. Parnell*, 147 Pa. 523, 23 Atl. 838 (1892); *Willson v. Fertilizer Co.*, 67 S. C. 467, 46 S. E. 279 (1903).

<sup>53</sup> See cases in footnotes 20-32, pp. 370-372, supra.

<sup>54</sup> *Bell v. Cunningham*, 28 U. S. (3 Pet.) 69, 7 L. Ed. 606 (1830); *Mobile Bank v. Huggins*, 3 Ala. 206 (1841); *Ashley v. Root*, 86 Mass. (4 Allen) 504 (1862); *Whiteman v. Hawkins*, L. R. 4 C. P. D. 13 (1878); *Cassaboglou v. Gibb*, 9 Q. B. D. 220 (1882); *Green v. Bouton*, 101 Wash. 454, 172 Pac. 576 (1918).

An agent charged with the disbursement of funds is not liable for any loss occurring through his negligence, if the exercise of reasonable care by the principal would have prevented the loss. *Sioux City & P. R. Co. v. Walker*, 49 Iowa, 273 (1878).

Cf. *Empire Development Co. v. Title G. & T. Co.*, 225 N. Y. 53, 121 N. E. 468 (1918), and *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520, and comment thereon in 33 Harv. L. R. 106.

custom than is within the scope of this book. A few examples will be enough to illustrate the foregoing principles. An agent instructed to insure must effect insurance within a reasonable time, or notify his principal of his inability to do so, and must use reasonable care in selecting a sufficient insurer and in securing a sufficient policy, and if he fails in his duty in this regard he is liable to the same extent as the underwriters would have been had the insurance been duly effected.<sup>55</sup> An agent authorized to invest must use reasonable care in selecting adequate security.<sup>56</sup> An agent authorized to sell on credit must use reasonable care to select a responsible purchaser.<sup>57</sup> An agent instructed to collect a claim must use reasonable diligence in demanding and enforcing payment, and is liable for the amount if by his neglect it is lost to the principal.<sup>58</sup> In the case of commercial paper, he must take all requisite steps to secure and preserve the rights of his principal against the various parties to the instrument, and must make due presentment for acceptance or payment, protest, and give notice of dishonor, as the circumstances may require.<sup>59</sup> After collection the agent must use reasonable diligence in remitting the proceeds.<sup>60</sup> It is the duty of a factor to whom goods are consigned for sale without instructions as to the time of sale or the price to exercise a reasonable discretion in the sale, and if he does so his duty

<sup>55</sup> *De Tastett v. Crousellat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828 (1807); *Maydew v. Forrester*, 5 Taunt. 615, 128 Rep. 831 (1814), omitting to communicate material letter to underwriters; *Turpin v. Bilton*, 5 M. & G. 455, 134 Rep. 641 (1843); *Elam v. Smithdeal R. & Ins. Co.*, 182 N. C. 599, 109 S. E. 632, 18 A. L. R. 1210 (1921).

<sup>56</sup> *Bannon v. Warfield*, 42 Md. 22 (1875); *Whitney v. Martine*, 88 N. Y. 535 (1882); *McFarland v. McClees*, 5 Atl. 50 (Pa. 1886).

<sup>57</sup> *Phillips v. Moir*, 69 Ill. 155 (1873); *Frick & Co. v. Larned*, 50 Kan. 776, 32 Pac. 383 (1893).

<sup>58</sup> *First Nat. Bank v. Bank*, 77 N. Y. 320, 33 Am. Rep. 618 (1879).

<sup>59</sup> *Chapman v. McCrea*, 63 Ind. 360 (1878); *First Nat. Bank v. Bank*, 77 N. Y. 320, 33 Am. Rep. 618 (1879).

<sup>60</sup> *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58 (1868).

is performed;<sup>61</sup> but if he sells for a less price than he might with reasonable care and diligence have obtained,<sup>62</sup> or if he fails to sell within a reasonable time and the price of the goods falls,<sup>63</sup> he is liable for the loss.

The extent of the obligation imposed upon the agent by his duty to use reasonable skill is well illustrated by cases involving the responsibility of attorneys to their clients. An attorney is liable to his client for any loss resulting from failure to possess and to apply with reasonable care and diligence to the matter in hand a reasonable knowledge of the law. He is required to have at least as great knowledge as is ordinarily possessed by attorneys of good standing in that community engaged in similar transactions.<sup>64</sup> "On the other hand, he is not answerable for error in judgment upon points of new occurrence or nice or doubtful construction."<sup>65</sup>

Although a person who has without consideration promised to perform an act on behalf of another is not bound to perform it, yet if he enters upon performance he is bound to conform to the authority<sup>66</sup> and to exercise a certain degree of skill and care; or, as it is usually put, he is

<sup>61</sup> Given v. Lemoine, 35 Mo. 110 (1864); Conway v. Lewis, 120 Pa. 215, 13 Atl. 826, 6 Am. St. Rep. 700 (1888).

<sup>62</sup> Bigelow v. Walker, 24 Vt. 149, 58 Am. Dec. 156 (1852).

<sup>63</sup> Atkinson v. Burton, 67 Ky. (4 Bush) 299 (1868).

<sup>64</sup> Wilson v. Russ, 20 Me. 421 (1841); STEVENS v. WALKER, 55 Ill. 151, Powell, Cas. Agency, 348 (1870); Jamison v. Weaver, 81 Iowa, 212, 46 N. W. 996 (1890); Isham v. Parker, 3 Wash. 755, 29 Pac. 835 (1892).

"He is liable for the consequences of ignorance or nonobservance of the rules of practice of this court, for want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allowed to his department of the profession." Godefroy v. Dalton, per Tindal, C. J., 6 Bing. 460, 130 Rep. 1357 (1830).

<sup>65</sup> Godefroy v. Dalton, 6 Bing. 460, 130 Rep. 1357 (1830); Watson v. Muirhead, 57 Pa. 161, 98 Am. Dec. 213 (1868); Citizens' Loan Fund & Savings Ass'n v. Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320 (1889).

<sup>66</sup> Supra, section 6.

not liable for nonfeasance, but he is liable for misfeasance. The ground of this liability is somewhat obscure.<sup>67</sup> Where the principal delivers over to an agent something which is the subject of the agency, it is perhaps possible to find a consideration in the detriment which the principal suffers by parting with the control,<sup>68</sup> but in many cases this element of consideration, if such it be, does not exist. It has sometimes been said that if the agent enters upon performance, the trust and confidence reposed is a sufficient consideration for his undertaking,<sup>69</sup> but, if trust and confidence were to be deemed a consideration, trust and confidence reposed would be a sufficient consideration for a promise to perform, and render the agent liable for nonfeasance. It must be admitted that the responsibility of the gratuitous agent arises independently of any consideration to support his undertaking. Nevertheless it seems that the trust and confidence reposed, although not to be regarded as a consideration, is the foundation of the agent's duty—a duty which the law imposes upon other persons besides agents, if they see fit so to enter upon the performance of gratuitous undertakings.<sup>70</sup> "It is well settled," said Ames, J., in a case in which a landlord who had gratuitously undertaken to make repairs was held liable for personal injuries to the tenant, resulting from failure to use ordinary care and skill in making them, "that for an injury occasioned by want of due care and skill in doing what one has promised to do an action may be maintained against

<sup>67</sup> See Anson, *Contr.* (1919 Ed.) pp. 133-135.

<sup>68</sup> *Coggs v. Bernard*, 2 Ld. R. 909, 92 Rep. 107 (1702); *Whitehead v. Greetham*, 2 Bing. 464, 130 Rep. 385 (1825).

<sup>69</sup> Cf. *Siegel v. Spear & Co.*, 234 N. Y. 479, 138 N. E. 414, 26 A. L. R. 1208 (1923).

<sup>70</sup> *Hammond v. Hussey*, 51 N. H. 40, 12 Am. Rep. 41 (1871).

<sup>70</sup> *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548 (1870).

"And therefore, when I have reposed a trust in you upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action." Per Powell, J., in *Coggs v. Bernard*, 2 Ld. R. 909, 92 Rep. 107 (1702).

him by the party relying on such promise and injured by the breach of it, although there was no consideration for the promise."<sup>71</sup> The scope of the agent's duty and the degree of skill and care demanded of him are to be measured by the nature and degree of the confidence and trust which, under the circumstances of the case, the principal is justified in reposing, or, in other words, by the degree of skill and care which the agent by reasonable implication undertakes to use.<sup>72</sup>

It has from early times been laid down that a gratuitous agent<sup>73</sup> or bailee,<sup>74</sup> is liable only for gross negligence. Yet it has not been questioned that the degree of skill and care demanded depends upon the circumstances of the particular case, and that failure to exercise the degree of skill and care demanded is actionable negligence.<sup>75</sup> Judges and writers to-day agree that the term "gross negligence" is misleading; gross negligence being, as declared by Rolfe, B., no more than negligence "with the addition of a vitu-

<sup>71</sup> *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548 (1870).

<sup>72</sup> See "Gratuitous Undertakings," by Joseph H. Beale, Jr., 5 Harv. Law Rev. 222 (1891).

<sup>73</sup> *Shiells v. Blackburne*, 1 H. Bl. 159, 126 Rep. 94 (1789); *Grant v. Ludlow's Adm'r*, 8 Ohio St. 1 (1857); *Hammond v. Hussey*, 51 N. H. 40, 12 Am. Rep. 41 (1871).

<sup>74</sup> *Coggs v. Bernard*, 2 Ld. R. 909, 92 Rep. 107 (1702); *Foster v. Bank*, 17 Mass. 479, 9 Am. Dec. 168 (1821); *Beardslee v. Richardson*, 11 Wend. 25, 25 Am. Dec. 596 (N. Y. 1833); *Giblin v. McMullen*, L. R. 2 P. C. 317 (1869); *Charlesworth v. Whitlow*, 74 Ark. 277, 85 S. W. 423 (1905).

<sup>75</sup> See cases cited in next preceding footnote.

"Lawrence, being an agent acting without compensation, is liable only for gross negligence. To define what constitutes gross negligence, so as to render the phrase more intelligible or exact, is difficult, if not impossible, and all attempts to do so have, it would seem, heretofore failed. We are disposed to regard it as a question of fact, to be determined by reference to all the circumstances of the case, including the subject-matter and objects of the agency, and the known character, qualifications, and relations of the parties." Per Brinkerhoff, J., in *Grant v. Ludlow's Adm'r*, 8 Ohio St. 1, at page 10 (1857).

Cf. *Briere v. Taylor*, 126 Wis. 347, 105 N. W. 817 (1905).

perative epithet."<sup>76</sup> In this view, the negligence which renders the agent liable to pay damages is failure to exercise that degree of skill and care which, under the circumstances, the agent undertakes to exercise.<sup>77</sup> The fact that the agent is unremunerated is but one of the circumstances to be considered, with all the other circumstances, in determining the nature of his undertaking, and in very many cases the standard of performance undertaken by gratuitous agents is no less high than that undertaken by paid agents. Thus, if an agent professes skill, he must exercise skill, whether he is paid or unpaid. If he undertakes, although gratuitously, to perform an act within the line of his profession or business, the principal is justified in relying upon him to exercise such skill and care as is demanded by the ordinary standard of performance of his profession or business, and the agent consequently undertakes for that standard of performance.<sup>78</sup> On the other hand, a profession of adequate skill is more readily to be inferred when the agent undertakes to serve for reward than when he consents to serve as a matter of favor; for the mere undertaking to serve for reward implies *prima facie* a profession that the services are worth the reward.<sup>79</sup>

<sup>76</sup> *Wilson v. Brett*, 11 M. & W. 113, at page 116, 152 Rep. 737 (1843). See, also, *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548 (1870); *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788 (1891); *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766 (1894).

"In each case the negligence, whatever the epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate to call it simply negligence." *Per Bradley, J.*, in *N. Y. Central R. Co. v. Lockwood*, 84 U. S. (17 Wall) 357, 21 L. Ed. 627 (1872).

<sup>77</sup> See cases in next preceding footnote and *Colyar v. Taylor*, 41 Tenn. (1 Cold.) 372, 379 (1860); 5 Harv. Law Rev. 222.

<sup>78</sup> *Shiells v. Blackburne*, 1 H. Bl. 159, 126 Rep. 94 (1789); *McNevins v. Lowe*, 40 Ill. 209 (1866), physician; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775 (1885), banker; *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766 (1894), broker; *DE HART v. DE HART*, 70 N. J. Eq. 774, 67 Atl. 1074, Powell, Cas. Agency, 351 (1905).

<sup>79</sup> See cases in footnote 47, p. 377, *supra*.

In every case an undertaking is to be implied that the agent will exercise whatever skill he possesses, for failure to do so would be failure to exercise even slight care.<sup>80</sup> So, too, the agent must use at least as great care as he takes in his own affairs;<sup>81</sup> but his habitual care, if inadequate, is not to be taken as the measure of his undertaking, unless the principal from his prior knowledge is not justified in relying upon a higher degree of care.

Notwithstanding the disapproval of the term "gross negligence," there is, in effect, little difference between the latter and the earlier cases. Thus, in *Shiells v. Blackburn*,<sup>82</sup> decided in 1789, a general merchant undertook without reward to enter at the custom house for exportation a parcel of leather belonging to G., together with a parcel of his own. By agreement with G., he made one entry of both parcels, but by mistake entered them under a wrong denomination, in consequence of which the goods were seized. It was held that he was not liable for the loss. "If a man gratuitously undertakes," said Lord Loughborough, "to do a thing to the best of his skill, where his situation is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a shipbroker, or a clerk in the custom house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom house, such a mistake is not to be imputed to him as gross negligence." And in a recent case in New

<sup>80</sup> *Wilson v. Brett*, 11 M. & W. 113, 152 Rep. 737 (1843).

<sup>81</sup> *Shiells v. Blackburne*, 1 H. Bl. 159, 126 Rep. 94 (1789); *Beal v. South Devon Ry.*, 3 H. & C. 337, 342, 159 Rep. 560 (1864).

Cf. *Dorr v. Camden*, 55 W. Va. 226, 46 S. E. 1014, 65 L. R. A. 348 (1904).

<sup>82</sup> 1 H. Bl. 159, 126 Rep. 94 (1789).

York,<sup>83</sup> where a banker held himself out as dealing in choice stocks, and promised his customers careful attention in all financial transactions, it was held that he was bound to exercise the skill and knowledge of a banker engaged in loaning money for himself and his customers, although his services were rendered without compensation. "It does not follow," said the court, "that the banker was freed from the obligation of such diligence as he had promised to those who dealt with him, or was at liberty to withhold from his agency the exercise of the skill and knowledge which he held himself out to possess. Nothing, in general, is more unsatisfactory than attempts to define and formulate the different degrees of negligence; but, even where the neglect which charges the mandatory is described as 'gross,' it is still true that, if his situation or employment implies ordinary skill or knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge."

#### DUTIES OWED BY AGENT TO PRINCIPAL—TO ACT IN GOOD FAITH

146. It is the duty of the agent to exercise good faith and loyalty toward the principal in the transaction of the business intrusted to him. This requires—

- (a) That he shall not assume any position in which his interests will be antagonistic to those of the principal.

More specifically—

- (1) If, without consent of the principal, the agent acts both as agent and as party in the same transaction, the principal may repudiate the transaction, or adopt it and recover from the agent his profit.

<sup>83</sup> Isham v. Post, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766 (1894).

- (2) If, in a transaction requiring the exercise of discretion, the agent acts as agent for both parties without the knowledge and consent of both, either may repudiate the transaction.
  - (3) He cannot acquire any interest in the subject-matter of the agency nor any rights adverse to the principal based on a violation of instructions, a neglect of duty, or an abuse of the confidence reposed in him.
  - (4) He cannot, by direct or indirect means, make any profit from the agency except his compensation.
- (b) That he shall not assert the adverse interests or title of third parties to defeat the rights of his principal.
- (c) That he shall give notice to the principal of all facts relative to the business of the agency coming to his knowledge which may affect the principal's interests.

The duty of the agent to exercise good faith results from the fiduciary character of the relation. Of necessity, the principal must repose confidence in the agent, and must rely upon his good faith and loyalty to the interest which is committed to him. The agent must therefore act solely in the interest of his employer, and not in his own interest or in the interest of another. No person while acting as agent may enter into any transaction in which he has any personal interest, or take a position in conflict with the interest of his principal, unless the principal, with full knowledge of all the facts, consents.<sup>84</sup> Whenever such a

<sup>84</sup> Davoue v. Fanning, 2 Johns. Ch. 252 (N. Y. 1816); GILLETT v. PEPPERCORNE, 3 Beav. 78, 49 Rep. 31, Powell, Cas. Agency, 353 (1840); Michoud v. Girod, 45 U. S. (4 How.) 503, 555, 11 L. Ed. 1076 (1846); Keighler v. Manufacturing Co., 12 Md. 383, 71 Am. Dec. 600 (1858); Farnsworth v. Hemmer, 83 Mass. (1 Allen) 494, 79 Am. Dec. 756 (1861); Wadsworth v. Adams, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984 (1891).

transaction is entered into in violation of this principle, the principal, when the facts come to his knowledge, may repudiate the transaction, or may adopt it and claim an account of the profit made by the agent.<sup>85</sup>

It is a breach of the confidence upon which the relation rests for the agent to unite the inconsistent relations of agent and party in the same transaction. When the agent assumes to deal with himself in a matter in which he is expected to deal with third persons, his own interest and that of his principal are necessarily antagonistic, and the principal may repudiate the transaction, irrespective of whether or not it has resulted in loss and without regard to its bona fides.<sup>86</sup> An agent employed to buy may not buy from himself,<sup>87</sup> nor may an agent to sell become the purchaser.<sup>88</sup> Nor can evidence of custom be admitted to

<sup>85</sup> Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151 (1908).

<sup>86</sup> GILLETT v. PEPPERCORNE, 3 Beav. 78, 49 Rep. 31, Powell, Cas. Agency, 353 (1840); Michoud v. Girod, 45 U. S. (4 How.) 503, 11 L. Ed. 1076 (1846); Taussig v. Hart, 58 N. Y. 425 (1874); Green v. Knoch, 92 Mich. 26, 52 N. W. 80 (1892); Reeves v. Callaway, 140 Ga. 101, 78 S. E. 717 (1913); McNeil v. Holmes, 77 Or. 165, 150 Pac. 255 (1915); Hall v. Paine, 224 Mass. 62, 112 N. E. 153, L. R. A. 1917C, 737 (1916).

The relation sometimes continues to have legal consequences, even after its termination. Evans v. Evans, 196 Mo. 1, 93 S. W. 969 (1906).

<sup>87</sup> GILLETT v. PEPPERCORNE, 3 Beav. 78, 49 Rep. 31, Powell, Cas. Agency, 353 (1840); Bentley v. Craven, 18 Beav. 75, 52 Rep. 29 (1853); Conkey v. Bond, 36 N. Y. 427 (1867); Bischoffsheim v. Baltzer, 20 Fed. 890 (C. C. 1884); Disbrow v. Secor, 58 Conn. 35, 18 Atl. 981 (1889); Colbert v. Shepherd, 89 Va. 401, 16 S. E. 246 (1892); Montgomery v. Hundley, 205 Mo. 138, 103 S. W. 527, 11 L. R. A. (N. S.) 122 (1907); Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441 (1911); Conant v. Pettit, 92 N. J. Law, 543, 106 Atl. 469 (1919).

<sup>88</sup> Parker v. Vose, 45 Me. 54 (1858); Bain v. Brown, 56 N. Y. 285 (1874); Francis v. Kerker, 85 Ill. 190 (1877); Hodgson v. Raphael, 105 Ga. 480, 30 S. E. 416 (1898); Pierce Co. v. Beers, 190 Mass. 199, 76 N. E. 603 (1906); Meek v. Hurst, 223 Mo. 688, 122 S. W. 1022, 135 Am. St. Rep. 531 (1909); Bayne v. Whistler, 4 Alaska, 15 (1910); Telling v. Sullivan, 32 Ohio Cir. Ct. R. 312 (1911); Cuggy v. Zellar, 132 La. 222, 61 South. 209 (1913).

The clerk of a broker employed to sell land, who has access to the

convert a broker employed to buy for his employer into a principal to sell to him, unless the employer knows and assents to the dealing on the footing of such custom.<sup>89</sup> Nor will the agent be permitted to accomplish indirectly what he may not do directly, as by selling to a third person acting in his interest. Any person purchasing from the agent in the agent's interest, or with knowledge of his misconduct, stands in his shoes, and may be charged as trustee.<sup>90</sup> The rule applies to all agents, public<sup>91</sup> and private, and to all persons acting in a fiduciary capacity, such as trustees, executors, guardians, and the like.<sup>92</sup>

The law does not forbid dealings directly between principal and agent with respect to the subject-matter of the

correspondence with the seller, stands in such a relation of confidence to the latter that if he becomes the purchaser he is chargeable as trustee. *Gardner v. Ogden*, 22 N. Y. 327, at page 339, 78 Am. Dec. 192 (1860). See, also, *Hobday v. Peters*, 28 Beav. 349, 54 Rep. 400 (1860).

But, if a sale to a third person is consummated, the agency is so far terminated that the agent may agree to take the property from the purchaser and assume his obligations. *Robertson v. Chapman*, 152 U. S. 673, 11 Sup. Ct. 741, 38 L. Ed. 592 (1893); *Linn v. Clark*, 295 Ill. 22, 128 N. E. 824 (1920).

An agent to lease, who leases to his own wife, has done an act voidable by his principal. *Hay v. Long*, 78 Wash. 616, 139 Pac. 761 (1914).

Such conduct may justify a discharge. *Mackenzie v. Minis*, 132 Ga. 323, 63 S. E. 900, 23 L. R. A. (N. S.) 1003, 16 Ann. Cas. 723 (1909).

<sup>89</sup> *Robinson v. Mollett*, L. R. 7 H. L. 802 (1875).

Cf. *DE BUSSCHE v. ALT*, 8 Ch. D. 286, Powell, Cas. Agency, 201 (1877), and *Hall v. Paine*, 224 Mass. 62, 112 N. E. 153, L. R. A. 1917C, 737 (1916).

<sup>90</sup> *Martin v. Moulton*, 8 N. H. 504 (1837); *Fry v. Platt*, 32 Kan. 62, 3 Pac. 781 (1884); *McKay v. Williams*, 67 Mich. 547, 35 N. W. 159, 11 Am. St. Rep. 597 (1887); *Cole v. Iron Co.*, 59 Hun, 217, 13 N. Y. Supp. 851 (1891); *Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924 (1892); *Holtzman v. Linton*, 27 App. D. C. 241 (1906) aff'd 203 U. S. 600, 27 Sup. Ct. 781, 51 L. Ed. 335 (1906); *Moneta v. Hoffman*, 249 Ill. 56, 94 N. E. 72 (1911); *Reeves v. Callaway*, 140 Ga. 101, 78 S. E. 717 (1913); *Hanson v. Sjostrom*, 260 Fed. 460, 171 C. C. A. 286 (1919); *Bailey v. Colombe*, 45 S. D. 443, 188 N. W. 203 (1922).

<sup>91</sup> *People v. Board*, 11 Mich. 222 (1863).

<sup>92</sup> *Eaton, Eq.* (1923 Ed.) § 137.

agency, but all such dealings are regarded with suspicion. When an agent enters into a contract with his principal, he must make a full disclosure of all the material circumstances and of all the facts known to him relating to the subject-matter. If the principal seeks to impeach such a transaction, the burden of showing that no advantage was taken by the agent, and that it was entered into in good faith and after full disclosure, rests upon the agent.<sup>93</sup> A transaction entered into by the agent in violation of his trust is, of course, capable of ratification, and if, after the principal has acquired full knowledge of the facts, he does not repudiate it within a reasonable time, ratification will be implied.<sup>94</sup>

The duty of the agent to act solely with a view to the interest of his employer forbids him, in any transaction where the interests of the parties are adverse, from acting as agent for both parties, at least without their consent. Thus an agent employed to sell may not ordinarily act as agent of the buyer, since the duty which the agent owes to the seller to sell for the best price is inconsistent with his duty to the buyer to buy on the lowest terms. When the agent assumes antagonistic positions as agent for both, either may repudiate the transaction,<sup>95</sup> nor can the agent

<sup>93</sup> Fisher's Appeal, 34 Pa. 29 (1859); Nesbit v. Lockman, 34 N. Y. 167 (1866); Uhlich v. Muhlke, 61 Ill. 499 (1871); McPherson v. Watt, L. R. 3 App. Cas. 254 (1877); Rochester v. Levering, 104 Ind. 562, 4 N. E. 203 (1885); LeGendre v. Byrnes, 44 N. J. Eq. 372, 14 Atl. 621 (1888); Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190 (1908); Fox v. Simons, 251 Ill. 316, 96 N. E. 233 (1911).

<sup>94</sup> Marsh v. Whitmore, 88 U. S. (21 Wall.) 178, 22 L. Ed. 482 (1874); Amer. Mfg. Co. v. Williams, 103 Ark. 484, 145 S. W. 234 (1912); *supra*, § 58.

<sup>95</sup> Hesse v. Briant, 6 De G., M. & G. 623, 43 Rep. 1375 (1856); New York Cent. Ins. Co. v. Insurance Co., 14 N. Y. 85 (1856); Fish v. Leser, 69 Ill. 394 (1873); Shirland v. Iron Works Co., 41 Wis. 162 (1876); Guthrie v. Huntington Chair Co., 71 W. Va. 383, 76 S. E. 795 (1912); Cahall v. Lofland, 114 Atl. 224 (Del. Ch. 1921).

An insurance agent, who has been directed by his company to reduce a risk either by cancellation or reinsurance, cannot reinsure in another company of which also he is agent, without its consent.

recover compensation from either,<sup>96</sup> unless both consent to the double agency.<sup>97</sup> But if there is no conflict between the tasks imposed on the agent by the two principals, as where the terms of sale have been fixed by the seller, or are to be fixed by agreement between the parties, and the duty of the agent is solely to bring buyer and seller together, so that nothing is left to his discretion, he may act as agent for both.<sup>98</sup>

*Empire State Insurance Co. v. Insurance Co.*, 138 N. Y. 446, 34 N. E. 200 (1893).

<sup>96</sup> *Everhart v. Searle*, 71 Pa. 256 (1872); *RICE v. WOOD*, 113 Mass. 133, 18 Am. Rep. 459; *Powell, Cas. Agency*, 356 (1873); *Bollman v. Loomis*, 41 Conn. 581 (1874); *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458 (1876); *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385 (1881); *Burnham City Lumber Co. v. Rannie*, 59 Fla. 179, 52 South. 617 (1910); *Williams v. Knight Realty Co.*, 217 S. W. 753 (Tex. Civ. App. 1920), and comment thereon in 33 Harv. Law Rev. 976; *Deakin v. Scheuer*, 196 N. W. 222 (Wis. 1923).

"By engaging with the second, he forfeits his right to compensation from the one who first employed him. By the second engagement, the agent, if he does not in fact disable himself from rendering to the first the full quantum of services contracted for, at least tempts himself not to do so. And for the same reason he cannot recover from the second employer, who is ignorant of the first engagement. And, if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer." Per *McIlvaine, J.*, in *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528 (1881).

Evidence of custom to charge double commission is inadmissible. *Farnsworth v. Hemmer*, 83 Mass. (1 Allen) 494, 79 Am. Dec. 756 (1861); *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66 (1874).

If the commission has been paid, it may be recovered back by the principal. *Andrews v. Ramsay & Co.*, [1903] 2 K. B. 635, and comment therein in 4 Col. Law Rev. 224.

<sup>97</sup> *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528 (1881), and cases there cited. *Juell v. Export S. S. Corp.*, 202 App. Div. 204, 195 N. Y. Supp. 98 (1922).

Contra: *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458 (1876).

Cf. *Union Cent. Life Ins. Co. v. Pappan*, 36 Okl. 344, 128 Pac. 716 (1912).

<sup>98</sup> *Rupp v. Sampson*, 82 Mass. (16 Gray) 398, 77 Am. Dec. 416 (1860); *Orton v. Scofield*, 61 Wis. 382, 21 N. W. 261 (1884); *Ranney v. Donovan*, 78 Mich. 318, 44 N. W. 276 (1889); *Knauss v. Brewing*

The agent may not acquire, without the consent of the principal, any interest in the subject-matter of the agency or any rights adverse to him based on a violation of instructions, a neglect of duty, or an abuse of the confidence reposed. Any property or interest so acquired the agent will hold as trustee for the principal, who upon such terms of reimbursement and remuneration as equity may demand may compel a transfer to himself, or who may compel an account of profits.

An agent employed to purchase property may not purchase in his own name or on his own behalf, and if he does so he will hold it as trustee.<sup>99</sup> And although he uses his own funds, he may be compelled, upon tender of the purchase price and his reasonable compensation to convey to his principal.<sup>1</sup> So an agent employed to buy or to settle a claim will not be permitted, if he buys it in his own name, to hold it adversely to his principal, or to recover from him more than he actually paid.<sup>2</sup>

Co., 142 N. Y. 70, 36 N. E. 867 (1894). See 6 Mich. Law Rev. 164, and 13 Mich. Law Rev. 524.

Cf. *Webb v. Paxton*, 36 Minn. 532, 32 N. W. 749 (1887); *Hutton v. Sherrard*, 183 Mich. 356, 150 N. W. 135, L. R. A. 1915E, 976 (1914), and notes in 13 Harv. Law Rev. 522, and 28 Harv. Law Rev. 623.

<sup>99</sup> *Parkist v. Alexander*, 1 Johns. Ch. 394 (N. Y. 1815); *Lees v. Nuttall*, 1 Russ. & M. 53, 39 Rep. 21 (1829) aff'd 2 Myl. & K. 819, 39 Rep. 1157 (1834); *Sweet v. Jacocks*, 6 Paige 355, 31 Am. Dec. 252 (N. Y. 1837); *Matthews v. Light*, 32 Me. 305 (1850); *Firestone v. Firestone*, 49 Ala. 128 (1873); *Barziza v. Story*, 39 Tex. 354 (1873); *Vallette v. Tedens*, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502 (1887); *Great Western Gold Co. v. Chambers*, 153 Cal. 307, 95 Pac. 151 (1908); *Bailey v. Colombe*, 45 S. D. 443, 188 N. W. 203 (1922).

<sup>1</sup> *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145 (1886); *Roswell v. Cunningham*, 32 Fla. 277, 13 South. 354, 21 L. R. A. 54 (1893); *Forlaw v. Augusta Naval Stores Co.*, 124 Ga. 261, 52 S. E. 898 (1905); *Bergner v. Bergner*, 219 Pa. 113, 67 Atl. 999 (1907); *Witte v. Storm*, 236 Mo. 470, 139 S. W. 384 (1911).

As to adjustments for interest, taxes, and rents for intervening period, see *Jackson v. Pleasanton*, 101 Va. 282, 43 S. E. 573 (1903).

Cf. *Blank v. Aronson*, 187 Fed. 241, 109 C. C. A. 327 (1911).

<sup>2</sup> *Reed v. Norris*, 2 Myl. & C. 361, 40 Rep. 678 (1837); *Smith v. Brotherline*, 62 Pa. 461 (1869); *Noyes v. Landon*, 59 Vt. 569, 10 Atl. 342 (1887); *Hogle v. Meyering*, 161 Mich. 472, 126 N. W. 1063 (1910).

Where the property thus adversely acquired by the agent is real estate, to which he takes title in his own name, and which he pays for with his own money, it is a disputed question whether, if he denies the trust, the principal can prove it by oral evidence. It has been declared that to permit the principal to compel the agent to convey the estate to him would be directly in the teeth of the statute of frauds,<sup>3</sup> which requires declarations or creations of trusts in land to be proved by writing signed by the party who declares the trust,<sup>4</sup> and this doctrine has very generally prevailed.<sup>5</sup> Many cases, however, hold, and it seems with the better reason, that, the trust arising from the previously established confidential relation, the agent may be charged as trustee as upon a trust arising by implication of law.<sup>6</sup>

An agent may not use for his own benefit, and to the detriment of his principal, information obtained in the course of the agency. Thus, if an agent in the course of his employment discovers a defect in his principal's title, he may not use the information to acquire the title for himself;<sup>7</sup> or if he discovers the existence of an outstanding charge, which he purchases at a discount, he can enforce it only for the amount actually paid.<sup>8</sup> So, where a confidential clerk, prior to the expiration of his employer's lease,

<sup>3</sup> 2 Sugden, *Vend.* (9th Ed.) c. 15, § 2.

<sup>4</sup> 29 Car. II, c. 3, § 7.

<sup>5</sup> *Botsford v. Burr*, 2 Johns. Ch. 406 (N. Y. 1817); *Burden v. Sheridan*, 36 Iowa, 125, 14 Am. Rep. 505 (1872); *Collins v. Sullivan*, 135 Mass. 461 (1883). See note 8 *Mich. Law Rev.* 689.

<sup>6</sup> *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145 (1886), an elaborate discussion; *Boswell v. Cunningham*, 32 Fla. 277, 13 South, 354, 21 L. R. A. 54 (1893); *Holtzman v. Linton*, 27 App. D. C. 241 (1906), affirmed 203 U. S. 600, 27 Sup. Ct. 781, 51 L. Ed. 335 (1906). See *Browne, St. Frauds* (5th Ed.) § 96.

<sup>7</sup> *Ringo v. Binns*, 35 U. S. (10 Pet.) 269, 9 L. Ed. 420 (1836); *Smith v. Brotherline*, 62 Pa. 461 (1869); *Cameron v. Lewis*, 56 Miss. 76 (1878). See, also, *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566 (1888).

<sup>8</sup> *Carter v. Palmer*, 8 Cl. & F. 657, 8 Rep. 256 (1842).

secretly obtained a lease for his own benefit, he was compelled to transfer it to his employer.<sup>9</sup>

An agent may not found adverse rights against his principal upon any neglect of duty. Thus, an agent charged with the payment of taxes on land, who neglects that duty, cannot acquire a valid tax title, but his purchase will inure to the benefit of his principal,<sup>10</sup> and this although he has not been placed in funds to pay.<sup>11</sup> Nor can an agent take advantage of his negligence to acquire rights which would have been secured to his principal by the exercise of proper skill and care.<sup>12</sup>

Good faith demands that an agent shall not, without the knowledge and consent of the principal, make any profit out of the agency, beyond his stipulated compensation, or a reasonable compensation, where none is fixed. All profits belong to the principal, and must be accounted for.<sup>13</sup>

<sup>9</sup> Gower v. Andrew, 59 Cal. 119, 43 Am. Rep. 242 (1881); Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541 (1883); ESSEX TRUST CO. v. ENWRIGHT, 214 Mass. 507, 102 N. E. 441, 47 L. R. A. (N. S.) 567, Powell, Cas. Agency, 358 (1913).

Cf. Goldstein v. Burrows, 237 Mass. 79, 129 N. E. 389 (1921).

Where a business manager secretly copied from his employer's order book a list of names of customers, and after termination of the employment used the list in a similar business on his own account, he was liable in damages to his employer. Robb v. Green, [1895] 2 Q. B. 1. See, also, Merryweather v. Moore, [1892] 2 Ch. 518, and Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. 898 (1905).

<sup>10</sup> Geisinger v. Beyl, 80 Wis. 443, 50 N. W. 501 (1891); Gonzalia v. Bartelsman, 143 Ill. 634, 32 N. E. 532 (1892); Siers v. Wiseman, 58 W. Va. 340, 52 S. E. 460 (1905).

Cf. Wilkerson v. Duerson, 177 Ky. 696, 198 S. W. 13 (1917).

<sup>11</sup> Bowman v. Officer, 53 Iowa, 640, 6 N. W. 28 (1880); Fox v. Zimmermann, 77 Wis. 414, 46 N. W. 533 (1890).

<sup>12</sup> An attorney, employed to attach, procure judgment, and levy the same on the land attached, is estopped from denying the validity of his work, to his own profit; and when such attachment and levy are defective, and he purchases the land, his title inures to the judgment creditor. A record that discloses such relation of attorney and client is notice to a subsequent purchaser from the attorney. Briggs v. Hodgson, 78 Me. 514, 7 Atl. 387 (1886).

<sup>13</sup> Morison v. Thompson, L. R. 9 Q. B. 480 (1874); Parker v. McKenna, L. R. 10 Ch. 96 (1874); Bain v. Brown, 56 N. Y. 285 (1874);

"Where the profits are made by a violation of duty, it would be obviously unjust to allow the agent to reap the fruits of his own misconduct, and, where the profits are made in the ordinary course of the business of the agency, it must be presumed that the parties intended that the principal should have the benefit thereof."<sup>14</sup> It is immaterial that the agent contributed his own funds and incurred all the risk,<sup>15</sup> and that the principal suffered no injury.<sup>16</sup> Nor will any usage which permits the agent to appropriate profits of the agency be upheld.<sup>17</sup> Thus, if an agent employed to sell purchases for himself and resells at an advance, he must account for the advance.<sup>18</sup> So, if he is employed to sell at not less than a given price, and he sells for a higher price.<sup>19</sup> An agent instructed to buy at a given

Dodd v. Wakeman, 26 N. J. Eq. 484 (1875); Warren v. Burt, 58 Fed. 101, 7 C. C. A. 105 (1893); Graham v. Cummings, 208 Pa. 516, 57 Atl. 943 (1904); Wells v. Cochran, 84 Neb. 278, 120 N. W. 1123 (1909); Messer-Moore, etc., Co. v. Trotwood, etc., Co., 170 Ala. 473, 54 South. 228, Ann. Cas. 1912D, 718 (1911); Hobbs v. Monarch, etc., Co., 277 Ill. 326, 115 N. E. 534, L. R. A. 1917D, 847; Ann. Cas. 1918A, 743 (1917).

<sup>14</sup> Story, Ag. § 207.

Cf. Beatty v. Guggenheim Exploration Co., 223 N. Y. 294, 119 N. E. 575 (1918).

<sup>15</sup> Williams v. Stevens, L. R. 1 P. C. 352 (1866); Dutton v. Willner, 52 N. Y. 312 (1873).

<sup>16</sup> Parker v. McKenna, L. R. 10 Ch. 96 (1874); Albright v. Phoenix Ins. Co., 72 Kan. 591, 84 Pac. 383 (1906); Mich. Crown F. Co. v. Welch, 211 Mich. 148, 178 N. W. 684, 13 A. L. R. 896 (1920); Parks v. Schoellkopf Co., 230 S. W. 704 (Tex. Civ. App. 1921); Thomas v. Newcomb, 221 Pac. 226 (Ariz. 1923).

<sup>17</sup> Thompson v. Havelock, 1 Camp. 527 (1808); Diplock v. Blackburn, 3 Camp. 43 (1811); Little v. Phipps, 208 Mass. 331, 94 N. E. 260, 34 L. R. A. (N. S.) 1046 (1911).

<sup>18</sup> DE BUSSCHE v. ALT, L. R. 8 Ch. D. 286, Powell, Cas. Agency, 201 (1877); Moore v. Petty, 135 Fed. 668, 68 C. C. A. 306 (1905); Forrester-Duncan Land Co. v. Evatt, 90 Ark. 301, 119 S. W. 282 (1909).

<sup>19</sup> Bain v. Brown, 56 N. Y. 285 (1874); Greenfield Sav. Bank v. Simons, 133 Mass. 415 (1882) Blanchard v. Jones, 101 Ind. 542 (1884); Kramer v. Winslow, 154 Pa. 637, 25 Atl. 766 (1893); Inter-

price must account for the profit, if he obtains the property for less.<sup>20</sup> He must account for any commission, discount, or personal benefit received from a third person.<sup>21</sup> An agent who is employed to give his whole time to his principal must account for any compensation received for services rendered to another.<sup>22</sup>

*national Harvester Co. v. Walker*, 138 Iowa, 638, 116 N. W. 706 (1908); *Sutherland v. Guthrie*, 86 W. Va. 208, 103 S. E. 298 (1920).

An agent settling a claim for less than authorized must account for the difference. *Judevine v. Town of Hardwick*, 49 Vt. 180 (1876).

But, if an agent commissioned to sell is authorized to retain all over a certain price, he need not refund the excess. *Anderson v. Weiser*, 24 Iowa, 428 (1868).

An agent authorized to sell land and to keep all he might obtain above a specified sum was bound to inform his principal of facts afterwards discovered increasing the value of the land. *Hegenmyer v. Marks*, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808 (1887); *Snell v. Goodlander*, 90 Minn. 533, 97 N. W. 421 (1903); *Madden v. Cheshire Prov. Inst.*, 77 Kan. 415, 94 Pac. 793 (1908).

<sup>20</sup> *Kimber v. Barber*, L. R. 8 Ch. 56 (1872); *Keyes v. Bradley*, 73 Iowa, 589, 35 N. W. 656 (1887); *Duryea v. Vosburgh*, 138 N. Y. 621, 33 N. E. 932 (1893); *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873 (1904); *LAURENCE v. KILGORE*, 154 Cal. 310, 97 Pac. 760, Powell, Cas. Agency, 363 (1908); *Whitehead v. Linn*, 45 Colo. 427, 102 Pac. 286 (1909); *Hogle v. Meyering*, 161 Mich. 472, 126 N. W. 1063 (1910); *Malden, etc., Co. v. Chandler*, 211 Mass. 226, 97 N. E. 906 (1912); *Conant v. Pettit*, 92 N. J. Law, 543, 106 Atl. 469 (1919).

<sup>21</sup> *Morison v. Thompson*, L. R. 9 Q. B. 480 (1874); *MAYOR OF SALFORD v. LEVER*, [1891] 1 Q. B. 168, Powell, Cas. Agency, 294, bribe; *Merrill v. Sax*, 141 Iowa, 386, 118 N. W. 434 (1909); *Frances, etc., Co. v. McKay*, 37 Nev. 191, 141 Pac. 456 (1914); *Texana Oil & R. Co. v. Belchic*, 150 La. 88, 90 South. 522 (1922).

He is not allowed sums disbursed from such commission. *Dennison & Co. v. Aldrich*, 114 Mo. App. 700, 91 S. W. 1024 (1905); *Thomas v. Newcomb*, 221 Pac. 226 (Ariz. 1923).

Cf. section 439, N. Y. Pen. Law, and also note, 5 Col. Law Rev. 319.

<sup>22</sup> *Thompson v. Havelock*, 1 Camp. 527 (1808); *Gardner v. McCutcheon*, 4 Beav. 534, 49 Rep. 446 (1842); *Leach v. Railroad Co.*, 86 Mo. 27, 56 Am. Rep. 408 (1885).

One who uses in his own business property delivered to him for use in that of his employer is liable for the value of the use. *Stebbins v. Waterhouse*, 58 Conn. 370, 20 Atl. 480 (1890); *ROBERT REIS & CO. v. VOLCK*, 151 App. Div. 613, 136 N. Y. Supp. 367, Powell, Cas. Agency, 364 (1912); *McKinlay v. Ogden*, 62 Pa. Super. Ct. 18 (1915).

The duty of loyalty forbids the agent as a rule to deny the title of his principal, or to set up the adverse title of a third person, to goods or money received by him from his principal or on his account.<sup>23</sup> He may, however, show that since the receipt of the property the principal has parted with the title,<sup>24</sup> or that he has himself been divested of possession by title paramount.<sup>25</sup> If the goods were wrongfully obtained by the principal, and are claimed by the true owner, the agent may set up the title of the latter in an action brought by the principal.<sup>26</sup> And if money is obtained by the agent wrongfully, or is paid to him under a mistake of fact, or for a consideration which fails, so that he is liable to repay it to the person from whom he obtained it, and he does so repay it, he may show the fact as a defense, if called on by his principal to account.<sup>27</sup>

If an agent has received money on behalf of his principal under an illegal contract, he must account for the money, and cannot set up illegality which the other party has waived;<sup>28</sup> nor, if he has received money from his principal for

<sup>23</sup> *Zaulueta v. Vinent*, 1 De G., M. & G. 315, 42 Rep. 573 (1852); *Murray v. Vanderbilt*, 39 Barb. 140 (N. Y. 1863); *Hancock v. Gomez*, 58 Barb. 490 (N. Y. 1871); *Monongahela Nat. Bank v. First Nat. Bank*, 226 Pa. 270, 75 Atl. 359, 26 L. R. A. (N. S.) 1098 (1910); *Loveless v. Bridges*, 136 Ga. 338, 71 S. E. 166 (1911).

<sup>24</sup> *Marvin v. Ellwood*, 11 Paige 365 (N. Y. 1844); *Roberts v. Noyes*, 76 Me. 590 (1885).

<sup>25</sup> *Hardman v. Willcock*, 9 Bing. 382, note, 131 Rep. 659, note (1832); *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145 (1846); *Biddle v. Bond*, 6 B. & S. 225, 122 Rep. 1179 (1865); *Bliven v. Railroad Co.*, 36 N. Y. 403 (1867); *Moss Mercantile Co. v. First Nat. Bank*, 47 Or. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657, 8 Ann. Cas. 569 (1905).

<sup>26</sup> *Biddle v. Bond*, 6 B. & S. 225, 122 Rep. 1179 (1865), although the agent has not yielded possession to the claimant; *Western Transport Co. v. Barber*, 56 N. Y. 544 (1874).

<sup>27</sup> Where an agent sold a horse and received the price, and the sale was rescinded for the agent's fraud, and the price returned, he was not liable to the principal for the purchase money. *Murray v. Mann*, L. R. 2 Ex. 538, 154 Rep. 605 (1848).

See section 133, *supra*.

<sup>28</sup> *Gilliam v. Brown*, 43 Miss. 641 (1870); *Bridger v. Savage*, L. R. 15 Q. B. D. 363 (1885); *Snell v. Pells*, 113 Ill. 145 (1885); *Dillman*

an illegal purpose, which is executed, can he refuse to refund to the principal on demand.<sup>29</sup>

It is the duty of the agent to give notice of all facts coming to his knowledge which may make it necessary for the principal to take steps for his security, and failure to do so renders the agent liable for any resulting loss.<sup>30</sup> Thus an agent employed to insure must notify his principal promptly if he is unable to effect insurance.<sup>31</sup> So, if the property intrusted to the agent is seized on legal process,<sup>32</sup> or if a person to whom he has sold becomes insolvent,<sup>33</sup> or if a note taken by him in payment for goods sold is not paid at maturity,<sup>34</sup> he must promptly apprise his principal.

v. Hastings, 144 U. S. 136, 12 Sup. Ct. 663, 36 L. Ed. 378 (1891) usurious interest; Cheuvront v. Horner, 62 W. Va. 476, 59 S. E. 964 (1907); Monongahela Nat. Bank v. First Nat. Bank, 226 Pa. 270, 75 Atl. 359, 26 L. R. A. (N. S.) 1098 (1910).

Some cases deny the principal relief when he must find his action on an illegal contract. Lemon v. Grosskopf, 22 Wis. 447, 99 Am. Dec. 58 (1868); LEONARD v. POOLE, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728, 11 Am. St. Rep. 667; Powell, Cas. Agency, 368 (1889). It is believed that the latter decisions are contra, at least in spirit, to the former cases.

<sup>29</sup> Kiewert v. Rindskopf, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731 (1879); Souhegan Nat. Bank v. Wallace, 61 N. H. 24 (1881); Decell v. Oil Mill, etc., Co., 83 Miss. 346, 35 South. 761 (1903); Kearney v. Webb, 278 Ill. 17, 115 N. E. 844, 3 A. L. R. 1631 (1917).

<sup>30</sup> Harvey v. Turner, 4 Rawle 222 (Pa. 1833); Laundy v. Girdner, 238 S. W. 788 (Mo. 1922).

An agent authorized to sell property on specified prices and terms is bound, on learning that a more advantageous sale can be made, to communicate the facts to his principal. Holmes v. Cathcart, 88 Minn. 213, 92 N. W. 956, 60 L. R. A. 734, 97 Am. St. Rep. 513 (1903); Bayne v. Whistler, 4 Alaska, 15 (1910). See, also, Hegenmyer v. Marks, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808 (1887).

Cf. Emerson v. Turner, 95 Ark. 597, 130 S. W. 538 (1910).

<sup>31</sup> See cases in footnote 55, p. 380, supra.

<sup>32</sup> Devall v. Burbridge, 4 Watts & S. 305 (Pa. 1842).

<sup>33</sup> Forrestier v. Bordman, 1 Story, 43, Fed. Cas. No. 4,945 (1839).

<sup>34</sup> Harvey v. Turner, 4 Rawle, 222 (Pa. 1833).

**DUTIES OWED BY AGENT TO PRINCIPAL—  
TO ACCOUNT**

147. It is the duty of the agent to account to the principal for all money and property coming into his hands by virtue of the employment, including all profits resulting from his transactions, either as agent, or on his own account in breach of his duty as agent. His specific duties in this respect are—

- (a) To keep accurate accounts of all his transactions in the course of the agency, and to render his accounts whenever required by the terms of his employment or upon demand;
- (b) To keep money and property of the principal separate from his own and from those of third persons;
- (c) To pay or deliver to the principal all money or property of the principal coming into his hands as agent whenever required by the terms of the employment or upon demand.

It is the duty of the agent to account to his principal for all money or property which comes into his hands as agent, and to pay or deliver to his principal all money or property of the principal in his hands pursuant to the express or implied understanding between them, or on demand. He must account for all profits and benefits received, whether in violation of his duty or in the legitimate course of the agency.<sup>35</sup> These obligations require him to keep and render accurate accounts of his dealings as agent, and to keep the money and property of his principal separate from his own and that of third persons. He is liable to account only to his principal.<sup>36</sup> A subagent employed

<sup>35</sup> See cases in footnotes 13–22, pp. 394–396, *supra*.

<sup>36</sup> *Pinto v. Santos*, 5 Taunt. 447, 128 Rep. 763 (1814); *Attorney General v. Chesterfield*, 18 Beav. 596, 52 Rep. 234 (1854).

In case of joint principals, he cannot be compelled to account to

by an agent is liable to account only to the agent who is his principal,<sup>37</sup> unless the agent was authorized to employ the subagent on behalf of the original principal directly as his agent, so that privity of contract was created between them.<sup>38</sup>

The agent must keep accurate accounts of all his dealings and transactions in the course of the agency, as well of payments and disbursements as of receipts, and must be constantly ready to render his accounts and vouchers when demanded.<sup>39</sup> Whether this requires the keeping of tech-

them separately. *Louisiana Board of Trustees for Blind v. Dupuy*, 31 La. Ann. 305 (1879).

<sup>37</sup> *Pownall v. Bair*, 78 Pa. 403 (1875); *New Zealand & A. L. Co. v. Watson*, L. R. 7 Q. B. D. 374 (1881); *National Bank of the Republic v. Bank*, 112 Fed. 726, 50 C. C. A. 443 (1902); *Ledwith v. Merritt*, 74 App. Div. 64, 77 N. Y. Supp. 341, affirmed 174 N. Y. 512, 66 N. E. 1111 (1903).

Defendant was clerk of an attorney employed to receive plaintiff's tithes, and with authority from and as agent for his master, who was absent, received moneys for tithes due plaintiff, but did not pay them over to his master, who never returned. Held, on the ground that there was no privity of contract between plaintiff and defendant, that an action for money had and received did not lie. *Stephens v. Badcock*, 3 B. & Ad. 354, 110 Rep. 133 (1832).

<sup>38</sup> *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291 (1842); *Wilson v. Smith*, 44 U. S. (3 How.) 763, 11 L. Ed. 820 (1845); *Miller v. Bank*, 30 Md. 392 (1869). See section 83, supra.

Where a ship was consigned to an agent in China for sale, a minimum price being fixed, and the agent, with consent of the principal, employed A. to sell the ship, who, being unable to find a purchaser, bought her himself at the minimum price, and resold at a profit, it was held that privity of contract existed between the principal and A., and that he was liable to account for the profit. *DE BUSSCHE v. ALT*, L. R. 8 Ch. D. 286, Powell, Cas. Agency, 201 (1877).

<sup>39</sup> *Pearse v. Green*, 1 Jac. & W. 135, 37 Rep. 327 (1819); *Clarke v. Tipping*, 9 Beav. 284, 50 Rep. 352 (1846); *Keighler v. Manufacturing Co.*, 12 Md. 383, 71 Am. Dec. 600 (1858); *Turner v. Burkinshaw*, L. R. 2 Ch. 488 (1867); *Illinois Linen Co. v. Hough*, 91 Ill. 63 (1878); *ARMOUR v. GAFFEY*, 30 App. Div. 121, 51 N. Y. Supp. 846 (1898), affirmed 165 N. Y. 630, 59 N. E. 1118, Powell, Cas. Agency, 372 (1901).

Cf. *Myer v. Abbott*, 105 App. Div. 537, 94 N. Y. Supp. 238 (1905), affirmed 186 N. Y. 519, 78 N. E. 1107 (1905).

The duty to account involves the right of the principal to assure

nical books of account must depend upon the nature of the business undertaken. Where an agent fails to keep and preserve accurate accounts, every unfavorable inference consistent with the established facts will be drawn against him.<sup>40</sup>

The duty to be ready with his account requires the agent to be ready to render it when demanded.<sup>41</sup> Whether he is bound to render it without demand must depend upon the understanding of the parties, arising from special agreement or from the previous course of dealing between them, the usages or customs of the particular agency, or other circumstances.<sup>42</sup> Thus it is ordinarily the duty of a collection agent to remit upon collection, and this duty involves the duty of rendering an account at the same time. In the absence of agreement a factor is not in default until demand,<sup>43</sup> but it has been held that, where a demand would be impracticable or highly inconvenient, he should render his account within a reasonable time.<sup>44</sup>

Necessarily incidental to the duty to account is the duty to keep the goods and money of the principal separate from his own or from those of other persons. If the agent mix-

himself that the accounts are proper and correct by inspection and examination of records. *Walker v. Hancock Mut. L. Ins. Co.*, 80 N. J. Law, 342, 79 Atl. 354, 35 L. R. A. (N. S.) 153, Ann. Cas. 1912A, 526 (1910).

The agent cannot be compelled to produce his books and documents to an improper person appointed by the principal, such as a rival in business. *Dadswell v. Jacobs*, L. R. 34 Ch. D. 278 (1887).

<sup>40</sup> *ARMOUR v. GAFFEY*, 30 App. Div. 121, 51 N. Y. Supp. 846 (1898), affirmed 165 N. Y. 630, 59 N. E. 1118; *Powell, Cas. Agency*, 372 (1901); *Gladiator Consol. Gold Mines & Milling Co. v. Steele*, 132 Iowa, 446, 106 N. W. 737 (1906); *Gilmore v. Gilmore*, 137 La. 162, 68 South. 395 (1915).

<sup>41</sup> *Turner v. Burkinshaw*, L. R. 2 Ch. 488, 491 (1867).

<sup>42</sup> *Clark v. Moody*, 17 Mass. 145 (1821); *Eaton v. Welton*, 32 N. H. 352 (1855); *Leake v. Sutherland*, 25 Ark. 219 (1868).

<sup>43</sup> *Topham v. Braddick*, 1 Taunt. 572, 127 Rep. 956 (1809).

<sup>44</sup> *Langley v. Sturtevant*, 24 Mass. (7 Pick.) 214 (1828); *Eaton v. Welton*, 32 N. H. 352 (1855).

es the principal's goods with his own, the burden is on him to identify his own; and if he fails to do so, or they are inseparable from the mass, the principal may take the whole.<sup>45</sup> If the agent mixes the principal's fund with his own, he is liable for so much as he cannot prove to be his own;<sup>46</sup> and, if the mingled fund is lost by accident or otherwise, or depreciates, the agent must make good the loss.<sup>47</sup> Thus an agent depositing money in bank, who deposits it in his own name, or without distinguishing it on the books of the bank as belonging to his principal, is responsible for the loss in the event of the failure of the bank.<sup>48</sup> One holding moneys in trust cannot be allowed so to invest or deposit them that he may claim them as his own if the venture proves profitable, or shift the loss upon his principal if a loss occurs.<sup>49</sup>

<sup>45</sup> Lupton v. White, 15 Ves. 432, 33 Rep. 817 (1808); Hart v. Ten Eyck, 2 Johns. Ch. 62 (N. Y. 1816); First Nat. Bank v. Kilbourne, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174 (1889).

Cf. Central Nat. Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693 (1881).

<sup>46</sup> Atkinson v. Ward, 47 Ark. 533, 2 S. W. 77 (1886). It has been held that in the usual course of business a factor is not required to keep the proceeds of the sale of goods of different consignors separate, but that he may mingle them in a common mass, and with like funds of his own; he becoming simply a debtor to his principal for the balance due by his account. Vail v. Durant, 89 Mass. (7 Allen) 408, 83 Am. Dec. 695 (1863). But see Banning v. Bleakley, 27 La. Ann. 257, 21 Am. Rep. 554 (1875), and Beugnot v. Tremoulet, 111 La. 1, 35 South. 362 (1903).

<sup>47</sup> Bartlett v. Hamilton, 46 Me. 435 (1859); Marine Bank v. Rushmore, 28 Ill. 463 (1862); Pinckney v. Dunn, 2 S. C. 314 (1871); MASSACHUSETTS LIFE INS. CO. v. CARPENTER, 32 N. Y. Super. Ct. 734, Powell, Cas. Agency, 376 (1870).

<sup>48</sup> Massey v. Banner, 1 Jac. & W. 241, 37 Rep. 367 (1820); Norris v. Hero, 22 La. Ann. 605 (1870); Naltner v. Dolan, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61 (1886); Williams v. Lowe, 62 Ind. App. 357, 113 N. E. 471 (1916).

The rule has been applied to an administrator depositing in his own name, though he had no other funds in the bank, and informed its officers that the funds were held in trust. Williams v. Williams, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708 (1882).

<sup>49</sup> Wren v. Kirton, 11 Ves. 377, 32 Rep. 1133 (1805); State v. Greensdale, 106 Ind. 364, 6 N. E. 926, 55 Am. Rep. 753 (1886).

A person who has received money or property as agent is bound, not only to account for it, but to pay or deliver when requested.<sup>50</sup> The time when the agent must pay over may of course be fixed by the contract of employment or by subsequent instructions, and, like the time for rendering his accounts, may be fixed by the implied understanding of the parties, arising from a previous course of dealing, the usages or customs of the particular agency, or other circumstances.<sup>51</sup> Thus it is ordinarily the duty of an agent employed merely to collect to remit within a reasonable time after receipt of the money, if no instructions in that particular have been given.<sup>52</sup> But money received by an agent merely as a deposit or in a continuing trust is in the agent's hands to await the principal's orders, and there is no duty to pay it over until demand.<sup>53</sup>

In accounting with his principal, the agent has, in general, a right to deduct the amount of his commissions, ad-

<sup>50</sup> Pearse v. Green, 1 Jac. & W. 135, 37 Rep. 327 (1819); Matthys v. Donelson, 179 Iowa, 1111, 160 N. W. 944 (1917).

<sup>51</sup> "Where the principal is advised from time to time by his agent of the sales as they are made, and again of the receipt of the monies as they are paid thereon, and according to the understanding that exists between them, arising either from a special agreement, or a previous course of dealing between them, or the established usage or custom, if there be any, regulating the same, the principal is to call on his agent or factor and receive his money, or to draw upon him for it, the latter may retain it until it is demanded. But where the factor or agent is bound, either by the agreement or previous course of dealing between them, or the usage of trade in regard thereto, to forward the money to his principal or employer, it is clearly his duty to do so as he shall receive, though it may be only a part of what he expects, by the earliest opportunity; and no practice to the contrary will either justify or excuse his retaining it beyond such time, unless the sum shall be so small as not to justify the expense of forwarding it." Brown v. Arrott, 6 Watts & S. 402, at page 418 (Pa. 1843).

<sup>52</sup> Campbell's Adm'r v. Boggs, 48 Pa. 524 (1865); Mast v. Easton, 33 Minn. 161, 22 N. W. 253 (1885); Wiley v. Logan, 96 N. C. 510, 2 S. E. 598 (1887).

<sup>53</sup> Watson v. Bank, 49 Mass. (8 Metc.) 217, 41 Am. Dec. 500 (1844); Burdick v. Garrick, L. R. 5 Ch. 233 (1870); Zuck v. Culp, 59 Cal. 142 (1881).

vances, and proper charges.<sup>54</sup> It seems that he has no right to set off against his principal a debt due him in a matter not arising out of the agency. That he has no right to apply to his own purposes money which he has received to apply to a particular purpose is, of course, clear;<sup>55</sup> and it has been held that an agent who collects a claim has no right to set off an antecedent debt.<sup>56</sup>

It is the general rule, though with some conflict of authority,<sup>57</sup> that no right of action accrues to the principal for money or property received by the agent which he has failed to pay over or deliver until proper demand has been made.<sup>58</sup> The right of action is based on the agent's breach of the duty to pay over the money or deliver the property, and the rule assumes that there is no breach until demand has been made and compliance therewith neglected or refused. The duty may, of course, become fixed upon the agent by other circumstances, and in case of its breach the principal's right of action is complete without demand. Thus, if by reason of the character of the agency, the established usages of the business, or the circumstances of the particular case, it is the agent's duty to remit or pay over within a reasonable time after receipt of the money,

<sup>54</sup> See section 157, infra.

<sup>55</sup> *Tagg v. Bowman*, 90 Pa. 376 (1882); *Id.*, 108 Pa. 273, 56 Am. Rep. 204 (1885). See, also, *Buchanan v. Findlay*, 9 B. & C. 738, 109 Rep. 274 (1829).

<sup>56</sup> *Shearman v. Morrison*, 149 Pa. 386, 24 Atl. 313 (1892); *Joyce-Pruitt Co. v. Dexter St. Bank*, 25 N. M. 1, 175 Pac. 868, 2 A. L. R. 128 (1918).

But in *Noble v. Leary*, 37 Ind. 186 (1871), it was held that an attorney who had collected money could set off a note held by him and executed by the principal.

<sup>57</sup> This conflict exists mainly with respect to certain classes of agents, and the question involved is whether they are, by the character of their duties, under obligation to remit or pay over within a reasonable time after receipt of the money. See cases in footnotes 51 and 52, p. 403, *supra*.

<sup>58</sup> *Topham v. Braddick*, 1 Taunt. 572, 127 Rep. 956 (1809); *Cooley v. Betts*, 24 Wend. 203 (N. Y. 1840); *Claypool v. Gish*, 108 Ind. 424, 9 N. E. 382 (1886); *Haaland v. Miller*, 67 Or. 346, 136 Pac. 9 (1913).

his failure to do so renders him liable to an action without demand.<sup>59</sup> So no demand is necessary where the agent has agreed,<sup>60</sup> or has been instructed,<sup>61</sup> to remit at a certain time, and has failed to do so. The agent may waive demand, and a waiver may be implied from the circumstances. Thus, where he denies the agency or the liability sought to be enforced,<sup>62</sup> his conduct amounts to a waiver of demand. Nor is any demand necessary where the agent has violated his duty to notify the principal of the receipt of the money within a reasonable time,<sup>63</sup> or where he has converted it to his own use.<sup>64</sup> It has also been held that, in cases where demand would be impracticable or highly inconvenient, the agent must account without demand, and that, on this ground, a foreign agent may be sued without a prior demand for an accounting.<sup>65</sup> But, on this point the authorities are not in harmony.<sup>66</sup>

The statute of limitations runs from the time the principal's right of action is complete. Thus it always runs from the time of demand and refusal,<sup>67</sup> but may run from the time an account is rendered showing a balance in the prin-

<sup>59</sup> *Brown v. Arrott*, 6 Watts & S. 402 at 418 (Pa. 1843). See cases cited, in footnote 52, p. 403, *supra*.

<sup>60</sup> *Mast v. Easton*, 33 Minn. 161, 22 N. W. 253 (1885); *Haebler v. Luttgen*, 2 App. Div. 390, 37 N. Y. Supp. 794 (1896).

<sup>61</sup> *Clark v. Moody*, 17 Mass. 145 (1821); *Cooley v. Betts*, 24 Wend. 203 (N. Y. 1840).

<sup>62</sup> *Hammett v. Brown*, 60 Ala. 498 (1877); *Wiley v. Logan*, 95 N. C. 358 (1886).

<sup>63</sup> *Cooley v. Betts*, 24 Wend. 203 (N. Y. 1840); *Krause v. Dorrane*, 10 Pa. 462, 51 Am. Dec. 496 (1849).

<sup>64</sup> *Chapman v. Burt*, 77 Ill. 337 (1875); *Terrell v. Butterfield*, 92 Ind. 1 (1883).

<sup>65</sup> *Clark v. Moody*, 17 Mass. 145 (1821); *Eaton v. Welton*, 32 N. H. 352 (1855).

<sup>66</sup> See *Topham v. Braddick*, 1 Taunt. 572, 127 Rep. 956 (1809); *Cooley v. Betts*, 24 Wend. 203 (N. Y. 1840).

<sup>67</sup> *Topham v. Braddick*, 1 Taunt. 572, 127 Rep. 956 (1809); *Sawyer v. Tappan*, 14 N. H. 352 (1843); *Waring v. Richardson*, 33 N. C. 77 (1850); *Jayne v. Mickey*, 55 Pa. 260 (1867); *Jett v. Hempstead*, 25 Ark. 463 (1869); *Quinn v. Gross*, 24 Or. 147, 33 Pac. 535 (1893).

Cf. *Sanford v. Lancaster*, 81 Me. 434, 17 Atl. 402 (1889).

cipal's favor, or even from the expiration of a reasonable time after the receipt of the money by the agent.<sup>68</sup>

If the agent is not chargeable with any default or breach of duty, and is ready to pay when called upon by the principal, he is not liable for interest on moneys in his hands unless he has received, or has agreed to pay, interest.<sup>69</sup> If, however, he unreasonably neglects to give the principal notice of the receipt of the money,<sup>70</sup> or improperly withholds money collected when it is his duty to pay it over,<sup>71</sup> or after demand in cases where he is entitled to demand,<sup>72</sup> such breach of duty renders him liable for interest from the time of such default. So, if he retains and applies to his own use the money of the principal, or otherwise deals with it improperly and in breach of his duty, he is chargeable with interest,<sup>73</sup> at least, while it is so employed.

For the enforcement of the agent's obligation to account, the principal may resort to the usual legal remedies for

<sup>68</sup> Hart's Appeal, 32 Conn. 520 (1865); Campbell v. Roe, 32 Neb. 345, 49 N. W. 452 (1891). See cases cited in footnote 52, p. 403, supra.

<sup>69</sup> Williams v. Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340 (N. Y. 1822); Wolfe v. Findlay, 6 Hare, 66, 67 Rep. 1085 (1847); Hyman v. Gray, 49 N. C. 155 (1856).

Cf. Beugnot v. Tremoulet, 111 La. 1, 35 South. 362 (1903).

<sup>70</sup> Williams v. Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340 (N. Y. 1822), dictum; Dodge v. Perkins, 26 Mass. (9 Pick.) 368 (1830).

<sup>71</sup> Board of Justices v. Fennimore, 1 N. J. Law, 242 (1794); Anderson v. State, 2 Ga. 370 (1847); See, also, Modern Irrigation & Land Co. v. Neely, 81 Wash. 38, 142 Pac. 458 (1914).

<sup>72</sup> Pearse v. Green, 1 Jac. & W. 135, 37 Rep. 327 (1819); Wheeler v. Haskins, 41 Me. 432 (1856); Hyman v. Gray, 49 N. C. 155 (1856); Boeing v. Fordney, 184 Mich. 153, 150 N. W. 852 (1915).

<sup>73</sup> Hill v. Hunt, 75 Mass. (9 Gray) 66 (1857); Hinckley v. Railroad Co., 100 U. S. 153, 25 L. Ed. 591 (1879); Schisler v. Null, 91 Mich. 321, 51 N. W. 900 (1892).

If an agent mixes the money of the principal with his own, and makes use of it, he is liable for interest on it from that time. Burdick v. Garrick, L. R. 5 Ch. 233 (1870); Blodgett's Estate v. Converse's Estate, 60 Vt. 410, 15 Atl. 109 (1888); Gladiator Consol. Gold Mines & Milling Co. v. Steele, 132 Iowa 446, 106 N. W. 737 (1906).

Cf. Wolfe v. Findlay, 6 Hare 66, 67 Rep. 1085 (1847).

He must pay interest on secret profits. Benson v. Heathorn, 1 Y. & Coll. C. C. 326, 62 Rep. 909 (1842).

breach of contract, or for conversion, or for the recovery of money due or of property wrongfully withheld.<sup>74</sup> And in many cases the principal has a right to have an account taken in a court of equity. This right depends upon the trust and confidence reposed in the agent, and it seems that it exists in all cases where there is a fiduciary relation between the parties, whereby it is the duty of the agent to keep an account of moneys received and to pay them over or account for them to the principal.<sup>75</sup> It has, indeed, been held that the right to an accounting in equity does not exist where only a single transaction is involved;<sup>76</sup> but since

<sup>74</sup> From his undertaking the agency, the law implies a promise on the agent's part to account for money received, and for breach of this promise assumpsit will lie. *Floyd v. Day*, 3 Mass. 403, 3 Am. Dec. 171 (1807); *Clark v. Moody*, 17 Mass. 145 (1821); *Campbell's Adm'r v. Boggs*, 48 Pa. 524 (1865); *Schick v. Suttle*, 94 Minn. 135, 102 N. W. 217 (1905); *Hogle v. Meyering*, 161 Mich. 472, 126 N. W. 1063 (1910); *ROBERT REIS & CO. v. VOLCK*, 151 App. Div. 613, 136 N. Y. Supp. 367, *Powell, Cas. Agency*, 364 (1912).

An agent authorized to collect accounts and pay creditors of the principal out of the proceeds may be sued in assumpsit for money had and received, on his refusal to account for the balance. *Tanner v. Page*, 106 Mich. 155, 63 N. W. 993 (1895). See, also, *Gottschalk v. Smith*, 156 Ill. 377, 40 N. E. 937 (1895).

Where an agent authorized to sell land for cash sells it for worthless bonds, he is liable in assumpsit for the amount he should have received. *Paul v. Grimm*, 165 Pa. 139, 30 Atl. 721, 44 Am. St. Rep. 648 (1895).

Where the agent refuses to account for the proceeds of goods sold, the principal may, at his election, sue for breach of contract or conversion of the goods. *Coit v. Stewart*, 50 N. Y. 17 (1872); *Challiss v. Wylie*, 35 Kan. 506, 11 Pac. 438 (1886). See, also, as to liability for conversion, cases in footnotes 33-37, p. 373, *supra*.

As to when replevin will lie, see *Terwilliger v. Beals*, 6 Lans. 403 (N. Y. 1872); *Robinson v. Stewart*, 97 Mich. 454, 56 N. W. 853 (1893).

<sup>75</sup> *Makepeace v. Rogers*, 4 De G., J. & S. 649, 46 Rep. 1070 (1865); *Marvin v. Brooks*, 94 N. Y. 71 (1883); *Vilwig v. Railroad Co.*, 79 Va. 449 (1884); *Rippe v. Stogdill*, 61 Wis. 38, 20 N. W. 645 (1884); *Webb v. Fuller*, 77 Me. 568, 1 Atl. 737 (1885).

Cf. *Dunn v. Johnson*, 115 N. C. 249, 20 S. E. 390 (1894); *Rogers v. Wheeler*, 89 App. Div. 435, 85 N. Y. Supp. 981 (1903).

<sup>76</sup> *Phillips v. Phillips*, 9 Hare. 471, 68 Rep. 596 (1852); *Navulshaw v. Brownrigg*, 2 De G., M. & G. 441, 42 Rep. 943 (1852); *Haaland v. Miller*, 67 Or. 346, 136 Pac. 9 (1913).

Cf. *Makepeace v. Rogers*, 4 De G., J. & S. 649, 46 Rep. 1070 (1865).

the jurisdiction does not depend upon the complication of accounts this view is not to be supported, although the fact that the account is complicated is, of course, a distinct ground of equitable jurisdiction.<sup>77</sup> On the other hand, the bare relation of principal and agent, where the agent is not employed in a fiduciary capacity, is not enough to confer jurisdiction.<sup>78</sup>

While, as a rule, an agent who has exercised due care and skill incurs no personal liability to his principal in respect to contracts entered into on his behalf, he may assume a personal liability by becoming a *del credere* agent. A *del credere* agent is a mercantile agent, usually a factor, who, in consideration of additional compensation, guarantees to his principal the payment of debts that become due through his agency.<sup>79</sup> As to the nature and extent of the obligation resting upon such agents there has been no little conflict. In England it was originally held that his obligation is absolute, making him liable in the first instance and in all events.<sup>80</sup> Later cases, however, have held that his obligation is secondary, and that he is merely a surety for the due performance of the person with whom he deals.<sup>81</sup> In this view it would follow that his undertaking is a promise to answer for the debt or default of another within the fourth section of the statute of frauds,<sup>82</sup> yet more recently it has been held that his undertaking is not within the statute;<sup>83</sup> a position that can hardly be reconciled with the

<sup>77</sup> Eaton, Eq. (1923 Ed.) § 258.

<sup>78</sup> Brown v. Corey, 191 Mass. 189, 77 N. E. 838 (1906); Eaton, Eq. (1923 Ed.) § 258.

<sup>79</sup> Lewis v. Brehme, 33 Md. 412, 3 Am. Rep. 190 (1870).

<sup>80</sup> Grove v. Dubois, 1 T. R. 112, 99 Rep. 1002 (1786); Mackenzie v. Scott, 6 Bro. P. C. 280, 2 Rep. 1081 (1796). See Bowstead, Dig. Ag. (1919 Ed.) art. 3.

<sup>81</sup> Morris v. Cleasby, 4 M. & S. 566, 105 Rep. 943 (1816). See, also, Hornby v. Lacy, 6 M. & S. 166, 105 Rep. 1205 (1817).

<sup>82</sup> 29 Car. II, c. 3.

<sup>83</sup> Couturier v. Hastie, 8 Ex. 40, 155 Rep. 1250 (1852); Sutton v. Grey, [1894] 1 Q. B. 285.

view that he is only secondarily liable.<sup>84</sup> In the United States the earlier view has prevailed, so that he may be charged in indebitatus assumpsit as for goods sold, and his undertaking is not within the statute of frauds.<sup>85</sup> In other respects he has the rights and duties of an ordinary agent. If he properly sells upon credit, he cannot be made accountable before the expiration of the credit.<sup>86</sup> Nor does the principal forego his rights against the third party, but he may forbid payment to the agent, and may maintain an action against the buyer for the price.<sup>87</sup>

<sup>84</sup> See *Wickham v. Wickham*, 2 Kay & J. 478, at page 487, 69 Rep. 570 (1855).

<sup>85</sup> *Swan v. Nesmith*, 24 Mass. (7 Pick.) 220, 19 Am. Dec. 282 (1828); *Sherwood v. Stone*, 14 N. Y. 267 (1856); *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190 (1871). Contra: *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972 (1823).

Cf. *Fletcher v. Fischer*, 93 Or. 265, 182 Pac. 822 (1919).

<sup>86</sup> *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190 (1871).

<sup>87</sup> *Hornby v. Lacy*, 6 M. & S. 166, 105 Rep. 1205 (1817).

"All the cases concede it to be the right of the principal to forbid payment to the agent, and to maintain an action himself against the buyer to recover the price of the goods, or to pursue his goods, or the notes taken for them, into the hands of third parties, precisely as if no *del credere* contract existed. And, though such right in the principal would seem to consist only with a collateral undertaking by the agent, yet, in the contract *del credere*, being *sui generis*, it is held in no wise to change the original and independent character of the agent's undertaking to his principal." Per Alvey, J., in *Lewis v. Brehme*, 33 Md. 412, at 428, 3 Am. Rep. 190 (1871).

Cf. *Cushman v. Snow*, 186 Mass. 169, 71 N. E. 529 (1904).

## CHAPTER XVI

### DUTIES OF PRINCIPAL TO AGENT

- Duties of Principal to Agent—
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- Duty of Principal to Remunerate Agent—
149. Origin in Contract.
150. Performance by Agent as a Condition Precedent.
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153. Termination Without Fault of Either Principal or Agent.
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155. Agent's Misconduct or Breach of Duty.
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- Machinery for Enforcement of Above Duties—
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161. Stoppage in Transitu.
- Restrictions on Enforcement of Above Duties—
162. Illegal Transactions.
163. By Subagent.

### DUTIES OF PRINCIPAL TO AGENT—CLASSIFICATION

148. The duties of a principal to his agent, if breached, impose either tortious or contractual liability on the principal. The duties of the latter type are two, to remunerate and to reimburse.

The duties owed by an employer to his employee may be classified according to the form of action conferred upon the employee by a breach. Some such breaches confer an action in tort; and others, an action in contract. Thus an employer is under certain duties as to the place where the employee is required to work, other duties as to the equipment or tools furnished to the employee, and still other duties as to the selection of competent coworkers. How-

ever, the employee at common law was frequently prevented from recovering against his employer because of the defenses of contributory negligence, assumption of risk, and the follow-servant doctrine. The rights of the employee in tort against his employer were worked out in the so-called field of master and servant.<sup>1</sup> The law thus developed has been completely changed in recent years by the Employers' Liability Acts and Workmen's Compensation Acts, and thus constitutes a topic by itself, far beyond the scope of this book.<sup>2</sup> The discussion of this chapter, therefore, treats only the contractual duties of the employer to his employee. The duties to compensate the agent for his services,<sup>3</sup> and to make the agent whole for expenditures made or incurred in the principal's service,<sup>4</sup> are such contractual obligations.

#### DUTY OF PRINCIPAL TO REMUNERATE AGENT— ORIGIN IN CONTRACT

149. The existence and extent of the duty of the principal to remunerate the agent is defined by the express or implied terms of the contract between them. The rendition of services pursuant to the express or implied request of the principal usually bases on implied promise to remunerate.

Ordinarily an agent performing services for his principal is entitled to remuneration, but a right to remuneration is not necessarily incidental to the relation, for the agent may undertake to perform gratuitously.<sup>5</sup> The existence of a right to remuneration and the amount thereof must in

<sup>1</sup> Chapin on Torts (1917) pp. 175-195.

<sup>2</sup> Honnold on Workmen's Compensation Laws (1917); Bradbury's Workmen's Compensation Law (1917).

<sup>3</sup> See sections 149-155, *infra*.

<sup>4</sup> See section 156, *infra*.

<sup>5</sup> Bilz v. Powell, 50 Colo. 482, at page 497, 117 Pac. 344, 38 L.R. A. (N. S.) 847 (1911); Story, Ag. § 323 et seq.

each case depend upon the express or implied terms of the contract of employment.<sup>6</sup> To a great extent this branch of the subject is governed by the rules which apply to other contracts, and the student is referred to the works upon contracts and quasi contracts for a fuller treatment.<sup>7</sup>

Where there is an express contract or agreement providing for the remuneration of the agent, the right to remuneration will, of course, be determined by its terms, and no terms inconsistent with the terms expressed will be implied.<sup>8</sup> Hence, if it is expressly agreed that the agent is to serve without reward, he can acquire no right thereto, however valuable his services. And if it is agreed that the principal may determine what remuneration, if any, is to be given, the agent has no absolute right to remuneration.<sup>9</sup>

More frequently the agent's right to compensation is not governed by express agreement, but rests upon an implied promise. *Prima facie* a promise to remunerate is to be implied from a request to perform, for it is a reasonable inference that one man will not serve another without reward.<sup>10</sup> The request may be implied as well as express.

<sup>6</sup> *Reeve v. Reeve*, 1 F. & F. 280 (1858); *Robinson v. Lincoln Trust Co.*, 95 N. J. Law, 445, 112 Atl. 733 (1921).

<sup>7</sup> *Williston on Contracts*; *Clark on Contracts*.

<sup>8</sup> *Bower v. Jones*, 8 Bing. 65, 131 Rep. 325 (1831); *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620 (1857); *HINDS v. HENRY*, 36 N. J. Law, 328, Powell, Cas. Agency, 378 (1873); *Garfield v. Peerless Motor Car Co.*, 189 Mass. 395, 75 N. E. 695 (1905).

<sup>9</sup> *Taylor v. Brewer*, 1 M. & S. 290, 105 Rep. 108 (1813).

Otherwise, if some payment is to be made, but the amount is left to the employer, in which case the agent may recover such amount as the employer, acting in good faith, ought to award. *Bryant v. Flight*, 5 M. & W. 114, 151 Rep. 49 (1839); *Butler v. Mill Co.*, 28 Minn. 205, 9 N. W. 697, 41 Am. Rep. 277 (1881).

<sup>10</sup> *Lewis v. Trickey*, 20 Barb. 387 (N. Y. 1855); *Manson v. Baillie*, 2 Macq. II. L. Cas. 80 (1855); *Mangum v. Ball*, 43 Miss. 288, 5 Am. Rep. 488 (1870).

Section 2991 of the Civil Code of Louisiana gives a contrary rule: "The procuration is gratuitous unless there has been a contrary agreement." The courts of that state have endeavored to modify this section by construction. See *Stewart v. Soubral & Tucker*, 119 La. 211, 43 South. 1009 (1907).

A person is under no obligation to pay for services which he has not requested, but a request may be implied from conduct, as where a person, having knowledge that services are being performed on his behalf, maintains silence, and receives the accruing benefit without dissent.<sup>11</sup>

The implied promise is ordinarily to pay a reasonable remuneration; that is, whatever the services are reasonably worth.<sup>12</sup> In commercial agencies the compensation usually takes the form of a commission, or the allowance of a certain percentage upon the amount or value of the business done. The commissions of brokers, factors, auctioneers, and other commercial agents are commonly regulated by the usage or custom of the particular business at the place where the agent is employed.<sup>13</sup> In such cases, if it is to be inferred that the parties contract upon the basis of the custom or usage, the amount and conditions of remuneration will be determined thereby.<sup>14</sup>

Although a promise to remunerate is *prima facie* to be implied from a request to perform, it by no means follows that in every case such an implication arises, for the circumstances may indicate that it is the intention of the parties that the services are to be rendered gratuitously.<sup>15</sup> Such intention may be indicated in many ways. Thus,

<sup>11</sup> *Westgate v. Munroe*, 100 Mass. 227 (1868); *McCrary v. Rudick*, 33 Iowa, 521 (1872); *Wood v. Brewer*, 66 Ala. 570 (1880); *Garrey v. Stadler*, 67 Wis. 512, 30 N. W. 787, 58 Am. Rep. 877 (1886); *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899 (1906).

<sup>12</sup> *Weeks v. Holmes*, 66 Mass. (12 *Cush.*) 215 (1853); *Ruckman v. Bergholz*, 38 N. J. Law, 531 (1875); *Millar v. Cuddy*, 43 Mich. 273, 5 N. W. 316, 38 Am. Rep. 181 (1880); *Forester v. Betts*, 179 N. C. 681, 103 S. E. 209 (1920).

<sup>13</sup> Text quoted and approved in *Humel v. Hoogendorn*, 5 Alaska, 25 (1914). See, also, *Case v. Rudolph Wurlitzer Co.*, 186 Mich. 81, 152 N. W. 977 (1915), and *Story, Ag.* § 326.

<sup>14</sup> *Weeks v. Holmes*, 66 Mass. (12 *Cush.*) 215 (1853); *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983 (1876).

<sup>15</sup> *Baxter v. Gray*, 3 M. & G. 771, 133 Rep. 1349 (1842); *Hill v. Williams*, 59 N. C. 242 (1861); *Morris v. Barnes*, 35 Mo. 412 (1865); *Wilmer v. Placide*, 119 Md. 49, 86 Atl. 43 (1912); *Robinson v. Lincoln Trust Co.*, 95 N. J. Law, 445, 112 Atl. 733 (1921).

where the parties stand in the relation of parent and child, or even are merely members of the same family, a promise to remunerate will not be implied from the mere request, but it will be assumed that the consideration or motive moving to performance is one of duty or affection, and in order to entitle the agent to compensation it must appear that there was an actual promise to compensate, or that other circumstances exist from which a promise may be implied.<sup>16</sup> So services are sometimes rendered with a view to obtain a contract of employment, under circumstances which show that there is no expectation of reward, unless the services result in such employment, as where an engineer or architect puts in a bid for the construction of works and furnishes plans and specifications, where there is no agreement to pay therefor in case of non-acceptance.<sup>17</sup> In the absence of peculiar circumstances, however, if the person employed is one who makes it his business to act as agent, as an auctioneer, broker, factor, or attorney, a promise to remunerate is always implied.<sup>18</sup>

No obligation rests upon a person to pay for services rendered without his request. On the other hand, as we have seen, ratification invests the agent with the same rights as if the transaction had been previously authorized; and consequently, where an agent has performed an act upon behalf of his principal in excess of his authority, or a stranger has assumed to act as agent of another, if such person elects to ratify the act, he assumes the burdens in-

<sup>16</sup> Hall v. Hall, 44 N. H. 293 (1862); Briggs v. Briggs' Estate, 46 Vt. 571 (1873); Morton v. Rainey, 82 Ill. 215, 25 Am. Rep. 311 (1876); Byrnes v. Clark, 57 Wis. 13, 14 N. W. 815 (1883); Cowan v. Musgrave, 73 Iowa, 384, 35 N. W. 496 (1887); HILL v. HILL, 121 Ind. 255, 23 N. E. 87, Powell, Cas. Agency, 383 (1889); Quirk v. Quirk, 155 Fed. 199 (1907). See Clark, Contracts (1914 Ed.) pp. 18-22.

<sup>17</sup> Palmer v. Inhabitants of Haverhill, 98 Mass. 487 (1868); Scott v. Maier, 56 Mich. 554, 23 N. W. 218, 56 Am. Rep. 402 (1885). See, also, Moffatt v. Laurie, 15 C. B. 583, 139 Rep. 553 (1855).

<sup>18</sup> Manson v. Baillie, 2 Macq. H. L. Cas. 80 (1855); Martin v. Roberts, 36 Fed. 217 (C. C. 1888).

cidental thereto, and the agent may look to him for remuneration.<sup>19</sup> Ratification can, however, have no greater force than previous authority; and, if the service was intended to be gratuitous, ratification will not render the principal liable to remunerate the agent.<sup>20</sup>

#### DUTY OF PRINCIPAL TO REMUNERATE AGENT— PERFORMANCE BY AGENT AS A CONDITION PRECEDENT

150. When an agent is employed to perform services for remuneration, he is entitled to that remuneration, unless the contract otherwise provides, as soon as he has performed the stipulated services, although the principal acquires no benefit therefrom.

If, by the express or implied terms of the contract of employment, the agent is to receive remuneration only upon performing specified services or in a certain contingency, the performance of the services specified or the happening of the contingency is a condition precedent to his right to recover, and if the condition is not fulfilled there can be no recovery upon a quantum meruit.<sup>21</sup> If, however, the condition is fulfilled, evidence of a custom making the remu-

<sup>19</sup> See section 64, *supra*.

<sup>20</sup> *Allen v. Bryson*, 67 Iowa, 591, 25 N. W. 820, 56 Am. Rep. 358 (1885). See, also, *Bartholomew v. Jackson*, 20 Johns. 28, 11 Am. Dec. 237 (N. Y. 1822); *Dearborn v. Bowman*, 44 Mass. (3 Metc.) 155 (1841); *Osier v. Hobbs*, 33 Ark. 215 (1878).

<sup>21</sup> *Franklin v. Robinson*, 1 Johns. Ch. 157 (N. Y. 1814); *Moffatt v. Laurie*, 15 C. B. 583, 139 Rep. 553 (1855); *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352 (1869); *HINDS v. HENRY*, 36 N. J. Law, 328; *Powell, Cas. Agency*, 378 (1873); *Zerrahn v. Ditson*, 117 Mass. 553 (1875); *Fultz v. Wimer*, 34 Kan. 576, 9 Pac. 316 (1886); *Compania I. M. v. Stilwell-Bierce & S. V. Co.*, 81 S. W. 538 (Tex. Civ. App. 1904); *Morrow v. Tunkhannock Ice Co.*, 211 Pa. 445, 60 Atl. 1004 (1905); *Haas v. Malto-Grapo Co.*, 148 Mich. 358, 111 N. W. 1059 (1907); *Laciар v. Jackson Motor Co.*, 162 App. Div. 492, 147 N. Y. Supp. 584 (1914).

neration dependent upon other conditions is inadmissible.<sup>22</sup> So, when the agent has fully performed,<sup>23</sup> or has substantially performed,<sup>24</sup> his undertaking, he is entitled to the remuneration promised; and in such case it is immaterial that his services have not been beneficial to the principal, whether this result has been brought about by the conduct of the principal or by that of a third person.<sup>25</sup> Thus, if a broker is employed to procure a loan, and procures a person who is ready and able to loan upon the terms prescribed by the contract of employment, the agent has earned his commission, although the principal fails to accept the loan.<sup>26</sup> So, if a broker is employed to procure a purchaser, and does procure a purchaser who is ready and able to buy upon the terms prescribed, the agent has earned his commission, although the principal refuses to sell.<sup>27</sup> So,

<sup>22</sup> *Bower v. Jones*, 8 Bing. 65, 131 Rep. 325 (1831).

<sup>23</sup> *Lockwood v. Levick*, 8 C. B. (N. S.) 603, 141 Rep. 1303 (1860); *Leete v. Morton*, 43 Conn. 219 (1875); *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192 (1876); *Pearson v. Mason*, 120 Mass. 53 (1876); *Bankers' Serv. Corp. v. Second National Bank*, 181 App. Div. 655, 168 N. Y. Supp. 906 (1918).

<sup>24</sup> *Horford v. Wilson*, 1 Taunt. 12, 127 Rep. 733 (1807); *Desmond v. Stebbins*, 140 Mass. 339, 5 N. E. 150 (1885); *Keene v. Frick Co.*, 93 N. W. 582 (Iowa, 1903).

<sup>25</sup> Cf. *Merrimac Mfg. Co. v. Bibb*, 119 Ark. 443, 178 S. W. 403 (1915).

<sup>26</sup> *Northw. Port Huron Co. v. Zickrick*, 32 S. D. 28, 141 N. W. 983, Ann. Cas. 1915B, 166 (1913).

Where an agent is entitled to commissions on orders, a refusal to accept, merely to defeat the right to commissions, will not defeat such right. *Jacquin v. Boutard*, 89 Hun, 437, 35 N. Y. Supp. 496 (1895), affirmed 157 N. Y. 686, 51 N. E. 1091 (1898).

<sup>27</sup> *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447 (1882).

<sup>28</sup> *Duelos v. Cunningham*, 102 N. Y. 678, 6 N. E. 790 (1887); *Hamilin v. Schulte*, 34 Minn. 534, 27 N. W. 301 (1886); *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391 (1888); *Davy P. Coal Co. v. Kaylor*, 118 Va. 296, 87 S. E. 549 (1916); *Carstens v. Nut House*, 96 Wash. 50, 164 Pac. 770 (1917).

If the agent procures a purchaser who is able, ready, and willing, he is entitled to compensation, though the seller refuses to carry out the contract, and though the purchaser could not have been compelled to do so, if he set up the statute of frauds. *Holden v. Starks*, 159 Mass. 503, 34 N. E. 1069, 38 Am. St. Rep. 451 (1893). But see *Gilchrist v. Clarke*, 86 Tenn. 583, 8 S. W. 572 (1888).

if an agent is to receive a commission upon sales made, he is entitled to his commission upon such sales, although the principal is unable to execute them.<sup>28</sup> What acts on the part of the agent are a sufficient performance must, of course, depend upon the terms of the particular contract of employment, and where the contract is not express will often depend upon the usage or custom of the business in which he is employed. A broker is not entitled to a commission upon a sale or other transaction unless his services are the efficient cause,<sup>29</sup> but if the transaction is brought about by his agency he is entitled to his commission upon it, although it is in fact carried on and completed by the principal.<sup>30</sup>

#### DUTY OF PRINCIPAL TO REMUNERATE AGENT —PERFORMANCE PREVENTED BY LAWFUL REVOCATION

**151.** Where the employment is at the will of the principal, and the authority is revoked after partial performance, whether the agent is entitled to remuneration for what he has done depends upon the express or implied terms of the contract.

As we have seen, the principal has the power, although not always the right, to revoke the authority of his agent

<sup>28</sup> Lockwood v. Levick, 8 C. B. (N. S.) 603, 141 Rep. 1303 (1860); SHIRT CO. v. SACKS, 184 Mo. App. 157, 168 S. W. 641, Powell, Cas. Agency, 386 (1914); Arthur Koenig Co. v. Graham Glass Co., 170 Wis. 472, 175 N. W. 814 (1920); Republic F. P. Co. v. Southwark F. & M. Co., 269 Pa. 522, 113 Atl. 74 (1921).

<sup>29</sup> Earp v. Cummins, 54 Pa. 394, 93 Am. Dec. 718 (1867); Wylie v. Bank, 61 N. Y. 415 (1875); Tribe v. Taylor, L. R. 1 C. P. D. 505 (1876).

<sup>30</sup> Green v. Bartlett, 14 C. B. (N. S.) 681, 143 Rep. 613 (1863); Lincoln v. McClatchie, 36 Conn. 136 (1869); Jones v. Adler, 34 Md. 440 (1871); Davis v. Huber Mfg. Co., 119 Iowa, 56, 93 N. W. 78 (1903); Sackett v. Centaur Motor Co., 189 Ill. App. 372 (1914).

at any time.<sup>31</sup> In other words, the exercise of the power of revocation is without prejudice to any claim for damages that the agent may have for breach of the contract of employment.

Where the principal has the right as well as the power to terminate the employment at his will, the question whether the agent is entitled to remuneration for services already performed depends upon the express or implied terms of the contract. It is, of course, competent for the parties to contract upon such terms that the agent takes the risk of revocation of authority or discharge from employment, and shall be entitled to no remuneration in case of revocation or discharge before full performance.<sup>32</sup> On the other hand, where the contract of employment contemplates that the agent shall incur trouble and expense, although the employment be terminable at the will of the employer, a promise to pay the agent reasonable remuneration for the trouble which he may actually incur will ordinarily be implied.<sup>33</sup> The contract may, of course, expressly provide for such remuneration in the event of revocation.<sup>34</sup>

<sup>31</sup> See section 86, *supra*.

<sup>32</sup> *Simpson v. Lamb*, 17 C. B. 603, 139 Rep. 1213 (1856); *Spear v. Gardner*, 16 La. Ann. 383 (1861); *Coffin v. Landis*, 46 Pa. 426 (1864); *Temby v. Brunt Pottery Co.*, 229 Ill. 540, 82 N. E. 336 (1907); *Addressograph Co. v. Off. App. Co.*, 106 Ark. 536, 153 S. W. 804 (1913).

<sup>33</sup> *Simpson v. Lamb*, 17 C. B. 603, 139 Rep. 1213 (1856). See, also, *U. S. v. Jarvis*, 2 Ware, 274, Fed. Cas. No. 15,468 (1846); *Chambers v. Seay*, 73 Ala. 372, 378 (1882).

<sup>34</sup> *In re London & S. Bank*, L. R. 9 Eq. 149 (1870); *Singer Mfg. Co. v. Brewer*, 78 Ark. 202, 93 S. W. 755 (1906).

**DUTY OF PRINCIPAL TO REMUNERATE AGENT—  
PERFORMANCE PREVENTED BY UNLAW-  
FUL REVOCATION**

152. Where the principal, in breach of an express or implied contract, revokes the authority of the agent, or otherwise prevents him from earning his remuneration, the agent is entitled either to treat the contract as rescinded and recover upon a quantum meruit for services rendered, or to recover damages for the loss resulting from the breach.

Where the contract of employment is for a definite term, and the principal without just cause revokes the agent's authority, or otherwise terminates the employment, the agent is entitled to the usual remedies for breach of contract.<sup>35</sup> Like a servant who is wrongfully discharged, he may pursue either of two remedies: (1) He may treat the contract as rescinded and sue his employer upon a quantum meruit for any services actually rendered, based upon an implied or quasi contract;<sup>36</sup> (2) he may maintain an action upon the original contract to recover damages for the loss resulting from its breach.<sup>37</sup>

If he elects the latter remedy, he may sue at once and recover the probable damages for the breach,<sup>38</sup> or he may wait until the expiration of the term, and sue for the actual

<sup>35</sup> Clark, Contracts (1914 Ed.) 558. Wood, Mast. & S. § 127.

<sup>36</sup> Britt v. Hays, 21 Ga. 157 (1857); Brinkley v. Swicegood, 65 N. C. 626 (1871); Howard v. Daly, 61 N. Y. 362, 369, 19 Am. Rep. 285 (1875); Richardson Mach. Co. v. Swartzel, 70 Kan. 773, 79 Pac. 660 (1905).

<sup>37</sup> Goodman v. Pocock, 15 Q. B. 576, 117 Rep. 577 (1850); Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (1875); Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8 (1879); James v. Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821 (1886).

<sup>38</sup> Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (1875); Sutherland v. Wyer, 67 Me. 64 (1877); CUTTER v. GILLETTE, 163 Mass. 95, 39 N. E. 1010, Powell, Cas. Agency, 388 (1895); Pierce v. Railroad Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591 (1898).

damages he has sustained.<sup>39</sup> Whether he sues at once, or not until after expiration of the term, the measure of damages is *prima facie* the amount of remuneration provided by the contract, but it is open to the defendant to reduce the amount of the recovery by proof of the amount which the agent in the one case might have earned by the exercise of reasonable diligence in seeking employment in similar business,<sup>40</sup> and in the other case by the amount which, in the interim, he has actually earned or which he might have earned with reasonable diligence.<sup>41</sup> The burden rests upon the defendant to show that the plaintiff has or might have secured other employment.<sup>42</sup> But while it is the duty of the discharged employee to seek other employment, at the risk of having his recovery reduced by the amount which he might thereby have earned, he is not bound to seek employment of a different character, or in a different locality, or with an objectionable person.<sup>43</sup>

It was formerly held in England that a servant or agent who was wrongfully discharged might elect to treat the contract as continuing, and by holding himself in readiness to perform until expiration of the term of employment then

<sup>39</sup> CUTTER v. GILLETTE, 163 Mass. 95, 39 N. E. 1010, Powell, Cas. Agency, 388 (1895).

In some cases it has been held that, if action be brought before expiration of the term, damages can be allowed only to the time of trial. Fowler v. Armour, 24 Ala. 194 (1854); Gordon v. Brewster, 7 Wis. 355 (1858); Litchenstein v. Brooks, 75 Tex. 196, 12 S. W. 975 (1889).

Cf. Everson v. Powers, 89 N. Y. 527, 42 Am. Rep. 319 (1882).

<sup>40</sup> Sutherland v. Wyer, 67 Me. 64 (1877); CUTTER v. GILLETTE, 163 Mass. 95, 39 N. E. 1010, Powell, Cas. Agency, 388 (1895); Pierce v. Railroad Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591 (1898); Hamilton v. Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384 (1899).

<sup>41</sup> Horn v. Association, 22 Minn. 233 (1875); Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (1875); Sutherland v. Wyer, 67 Me. 64 (1877).

<sup>42</sup> Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (1875). See also, cases cited in footnote 40, p. 420, *supra*.

<sup>43</sup> Costigan v. Railroad Co., 2 Denio, 609, 43 Am. Dec. 758 (N. Y. 1846); Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8 (1879).

have the right to recover his wages for the term, upon the ground of constructive service.<sup>44</sup> This doctrine has been repudiated in England, and generally in the United States,<sup>45</sup> although it prevails in some states.<sup>46</sup> By the generally approved doctrine, however, the employee, unless he elects to treat the contract as rescinded, is confined to an action for breach of contract; and while in such an action the stipulated remuneration is, *prima facie*, the measure of recovery, this may be reduced, as has been explained, by the amount of what he has or ought to have earned.

The same principles are applicable where the contract of employment, although not for a definite term, expressly or impliedly binds the employer not to revoke the authority before the transaction is completed, or otherwise to prevent the agent from earning his commission. As we have seen, where the contract contemplates that the agent shall incur trouble and expense, a promise to pay a reasonable remuneration for services actually rendered in the event of a revocation will readily be implied.<sup>47</sup> But the nature and terms of such an employment or the custom or usage of the particular business may be such as to indicate that it is the understanding that the authority shall not be revoked, or the agent otherwise be prevented from earning his commission, before the agent has completed the transaction, or, at least, until he has had a reasonable opportunity to complete it. Thus it has been said that a broker, employed to make a sale, is usually entitled to a fair and reasonable opportunity to perform, subject to the right of the principal to sell independently.<sup>48</sup> The right of the principal to re-

<sup>44</sup> *Gandell v. Pontigny*, 4 Camp. 375 (1816).

<sup>45</sup> *Goodman v. Pocock*, 15 Q. B. 576, 117 Rep. 577 (1850); *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285 (1875); *Hamill v. Foute*, 51 Md. 419 (1879); *James v. Allen County*, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821 (1886).

<sup>46</sup> *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8 (1879); *Allen v. Engineers' Co.*, 196 Pa. 512, 46 Atl. 899 (1900).

<sup>47</sup> See section 149, *supra*.

<sup>48</sup> *Simpson v. Lamb*, 17 C. B. 603, 139 Rep. 1213 (1856); *Sibbald*

voke the authority is also subject to the requirements of good faith upon his part. Hence, if a broker has instituted negotiations which are approaching success, the principal is not entitled to revoke the authority, with a view to concluding the bargain without his aid, and thus avoiding the commissions about to be earned.<sup>49</sup>

The principal has, of course, always the right to terminate the agency for any gross breach of duty upon the part of the agent.<sup>50</sup>

#### DUTY OF PRINCIPAL TO REMUNERATE AGENT— TERMINATION WITHOUT FAULT OF EI- THER PRINCIPAL OR AGENT

153. Where the contract of employment is discharged by operation of law, without the fault of either principal or agent, the agent or his representatives may, as a rule, recover upon a quantum meruit to the extent of services rendered.

As a rule, the circumstances which by operation of law terminate the authority of the agent,<sup>51</sup> or release the em-

v. Iron Co., 83 N. Y. 378, 38 Am. Rep. 441 (1881); Strong v. West, 110 Ga. 382, 35 S. E. 693 (1900).

Where a contract with an agent for sale provided that after the agent had made an agreement for sale the owner should not intentionally defeat it, nor at any time withdraw the property from sale without giving 30 days' notice, and, the owner having refused to be bound by an authorized agreement for sale, or to execute a deed, the agent delivered to the purchaser the contract of sale, which the latter accepted and was ready to perform, the agent was entitled to recover a sum equal to his commissions. Witherell v. Murphy, 147 Mass. 417, 18 N. E. 215 (1888).

Cf. Cadigan v. Crabtree, 179 Mass. 474, 61 N. E. 37, 55 L. R. A. 77, 88 Am. St. Rep. 397 (1901), and comment thereon in 1 Mich. Law Rev. 139.

<sup>49</sup> Sibbald v. Iron Co., 83 N. Y. 378, 38 Am. Rep. 441 (1881); Addressograph Co. v. Off. App. Co., 106 Ark. 536, 153 S. W. 804 (1913).

<sup>50</sup> See section 155, infra.

<sup>51</sup> See section 87, supra.

ployer from performance,<sup>52</sup> also operate to discharge the contract of employment. Thus, upon the death of the employer, the agent is discharged from performance,<sup>53</sup> and he may recover only upon a quantum meruit to the extent of his performance. So, upon the death<sup>54</sup> or physical or mental incapacity<sup>55</sup> of the agent, the contract is discharged, and he or his personal representatives may recover upon a quantum meruit, subject to the right of the principal to have the recovery reduced by the amount of any loss which he may have suffered from the nonperformance of the contract.<sup>56</sup> The right to recover, except on a full performance may, however, be excluded by the express terms of the contract.<sup>57</sup>

<sup>52</sup> *Damers v. Trident Fisheries Co.*, 119 Me. 343, 111 Atl. 418 (1920), and comment thereon in 19 Mich. Law Rev. 334.

<sup>53</sup> *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578 (1863); *Farrow v. Wilson*, L. R. 4 C. P. 744 (1869).

Otherwise in case of bankruptcy. *Lewis v. Insurance Co.*, 61 Mo. 534 (1876).

<sup>54</sup> *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189 (1863).

<sup>55</sup> *Fuller v. Brown*, 52 Mass. (11 Metc.) 440 (1846); *Hughes v. Wamsutta Mills*, 93 Mass. (11 Allen) 201 (1865), imprisonment; *Robinson v. Davison*, L. R. 6 Ex. 269 (1871); *Walsh v. Fisher*, 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. Rep. 865 (1899), violence by strikers.

*Cf. Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93 (1878).

Prevalence of a fatal contagious disease, such as cholera, in the neighborhood, is a discharge of the contract. *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77 (1857). But see *Dewey v. School Dist.*, 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206 (1880), which held that the presence of smallpox is not such a discharge.

<sup>56</sup> *Patrick v. Putnam*, 27 Vt. 759 (1855).

<sup>57</sup> *Cutter v. Powell*, 6 T. R. 320, 101 Rep. 573 (1795).

## DUTY OF PRINCIPAL TO REMUNERATE AGENT —TERMINATION BY AGENT'S RENUN- CIATION

154. Where the agent, in breach of an entire contract of employment, renounces his authority, he can in most jurisdictions recover nothing, although in some jurisdictions he can recover upon a quantum meruit.

If an agent without legal excuse abandons the employment before full performance, he can recover nothing for his services, neither upon the contract of employment, because under an entire contract performance is a condition precedent to the right of recovery thereon, nor upon an implied contract, because the special contract controls the rights of the parties in respect to what has been done under it, and excludes any implied contract.<sup>58</sup> In some states, however, the rule has been so far relaxed as to permit a recovery upon a quantum meruit to the extent of benefits actually conferred; the amount of the recovery, if any, being estimated at the contract price, with deduction of what it would cost to procure a completion of the residue of the service, and also of any damages sustained by reason of the breach.<sup>59</sup> Again, the right to remuneration for partial performance may be expressly or impliedly reserved, as

<sup>58</sup> *Olmstead v. Beale*, 36 Mass. (19 Pick.) 528 (1837); *Miller v. Goddard*, 34 Me. 102, 56 Am. Dec. 638 (1852); *Thrift v. Payne*, 71 Ill. 408 (1874); *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621, 43 Am. Rep. 719 (1883).

Cf. *Compania I. M. v. Stilwell-Bierce & S. V. Co.*, 81 S. W. 538 (Tex. Civ. App. 1904).

Otherwise of an infant. *Whitmarsh v. Hall*, 3 Denio, 375 (N. Y. 1846); *Widrig v. Taggart*, 51 Mich. 103, 16 N. W. 251 (1883).

<sup>59</sup> *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713 (1834); *McClay v. Hedge*, 18 Iowa, 66 (1864); *Parcell v. McComber*, 11 Neb. 209, 7 N. W. 529, 38 Am. Rep. 366 (1881); *Parker v. Brown & Bigelow*, 173 Ill. App. 48 (1912).

where the contract provides that the agent may quit at any time upon notice.

### DUTY OF PRINCIPAL TO REMUNERATE AGENT —AGENT'S MISCONDUCT OR BREACH OF DUTY

155. Where the agent is guilty of a breach of any fiduciary duty, or where the principal derives no benefit from the agent's services in consequence of his gross negligence or other breach of duty, he can recover no remuneration.

For a breach of the agent's duty to obey instructions to exercise reasonable care and skill, to act in good faith, and the like, the principal may terminate the agency without incurring liability on that account,<sup>60</sup> and the agent will, of course, lose all right to remuneration for further services. A breach of duty may also have the effect of debarring the agent from recovering remuneration for services already rendered. That such is the effect of violation of any duty arising from the fiduciary character of the relation is universally recognized.<sup>61</sup> Thus, if the agent is guilty of fraud or bad faith, he forfeits all claim to compensation.<sup>62</sup> The same result follows if he makes a sale directly or indirect-

<sup>60</sup> *Bilz v. Powell*, 50 Colo. 482, 117 Pac. 344, 38 L. R. A. (N. S.) 847 (1911).

<sup>61</sup> *Gray v. Haig*, 20 Beav. 219, 52 Rep. 587 (1855); *Quirk v. Quirk*, 155 Fed. 199 (C. C. 1907); *Schleifenbaum v. Rundbaken*, 81 Conn. 623, 71 Atl. 899 (1909); *Little v. Phipps*, 208 Mass. 331, 94 N. E. 260, 34 L. R. A. (N. S.) 1046 (1911).

<sup>62</sup> *Porter v. Silvers*, 35 Ind. 295 (1871); *Segar v. Parrish*, 61 Va. (20 Grat.) 672 (1871); *Brannan v. Strauss*, 75 Ill. 234 (1874); *Wadsworth v. Adams*, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984 (1891); *Martin v. Bliss*, 57 Hun, 157, 10 N. Y. Supp. 886 (1890); *Peterson v. Mayer*, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72 (1891); *Jackson v. Pleasanton*, 101 Va. 282, 43 S. E. 573 (1903); *Sidway v. Amer. Mortgage Co.*, 222 Ill. 270, 78 N. E. 561 (1906); *Audubon Bldg. Co. v. F. M. Andrews & Co.*, 187 Fed. 254, 111 C. C. A. 92 (1911).

ly to himself or to a company in which he is interested.<sup>63</sup> The right of the agent to compensation where he acts for both parties has already been considered.<sup>64</sup> A forfeiture of compensation may also result from negligence of the agent. If the agent is guilty of gross negligence in the conduct of the business intrusted to him, so that the principal derives no benefit therefrom, the agent is entitled to no remuneration;<sup>65</sup> but if, notwithstanding his negligence, the services are of some value, after making allowance for the loss sustained, it seems that he can recover their reasonable value.<sup>66</sup> So rendering false accounts, or even gross neglect to keep accounts and preserve vouchers, works a forfeiture of commissions,<sup>67</sup> although a mere failure to render an account at the stipulated time,<sup>68</sup> or irregularity in the account, when not fraudulent and admitting of explanation, will not necessarily work a total forfeiture, and may simply reduce the amount of the compensation by the amount of any necessary damages.<sup>69</sup> An agent is entitled to no compensation for an unauthorized transaction, unless the principal ratifies it.<sup>70</sup>

<sup>63</sup> McGar v. Adams, 65 Ala. 106 (1880); Murray v. Beard, 102 N.Y. 505, 7 N. E. 553 (1886); Hobson v. Peake, 44 La. Ann. 383, 10 South. 762 (1892).

<sup>64</sup> See section 146, *supra*.

<sup>65</sup> Dodge v. Tileston, 29 Mass. (12 Pick.) 328 (1832); Bracey v. Carter, 12 Ad. & E. 373, 113 Rep. 853 (1840); Fisher v. Dynes, 62 Ind. 348 (1878).

<sup>66</sup> Lee v. Clements, 48 Ga. 128 (1873).

<sup>67</sup> Ridgeway v. Ludlam, 7 N. J. Eq. 123 (1848); Fish v. Seeberger, 154 Ill. 30, 39 N. E. 982 (1894); Fulton v. Farmers' Ass'n v. Bomberger, 262 Pa. 43, 104 Atl. 805 (1918).

<sup>68</sup> Sampson v. Iron Works, 72 Mass. (6 Gray) 120 (1856).

<sup>69</sup> Jones v. Hoyt, 25 Conn. 374 (1856); Lee v. Clements, 48 Ga. 128 (1873).

Cf. Hale Elev. Co. v. Hale, 201 Ill. 131, 66 N. E. 249 (1903).

<sup>70</sup> See section 149, *supra*.

### DUTY OF PRINCIPAL TO REIMBURSE AND INDEMNIFY AGENT

156. It is the duty of the principal to reimburse the agent for all expenses, advances, and disbursements properly paid or incurred, and to indemnify him against the consequences of all acts properly done by him in the execution of the agency.

"Speaking generally, the agent has the right to be reimbursed for all his advances, expenses, and disbursements incurred in the course of the agency, made on account of or for the benefit of his principal, when such advances, expenses, and disbursements are reasonable, and have been properly incurred and paid without misconduct on the part of the agent."<sup>71</sup> The liability of the principal arises from an implied contract, a request to undertake an agency, the proper execution of which may involve expenditure on the agent's part, operating as an implied request to incur such expenditure and as an implied promise to repay.<sup>72</sup> It necessarily follows that the agent is not entitled to reimbursement in respect to any expenditure incurred without the express or implied authority of the principal.<sup>73</sup> Nor is he entitled to reimbursement in respect to any expenditure incurred in consequence of his own negligence or breach

<sup>71</sup> BIBB v. ALLEN, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819, per Jackson, J., Powell, Cas. Agency, 390 (1893). See, also, Frixione v. Tagliaferro, 10 Moore, P. C. 175 (1856); Rosenstock v. Tormey, 32 Md. 169, 3 Am. Rep. 125 (1870); Ruffner v. Hewitt, 7 W. Va. 585 (1874); Armstrong v. Pease, 66 Ga. 70 (1880); Gardner v. Kinney, 60 Or. 292, 117 Pac. 971 (1911); Jessen Liquor Co. v. Phoenix D. Co., 171 Iowa, 505, 153 N. W. 148 (1915); Philadelphia County v. Commonwealth, 276 Pa. 12, 119 Atl. 723 (1923).

<sup>72</sup> BIBB v. ALLEN, 149 U. S. 481, 31 Sup. Ct. 950, 37 L. Ed. 819, Powell, Cas. Agency, 390 (1893).

<sup>73</sup> Keyes v. Inhabitants of Westford, 34 Mass. (17 Pick.) 273 (1835); Barron v. Fitzgerald, 6 Bing. N. C. 201, 133 Rep. 79 (1840); Kennedy v. Meilicke Calculator Co., 90 Wash. 238, 155 Pac. 1043 (1916).

of duty.<sup>74</sup> Thus, where a solicitor undertook a prosecution, which failed in consequence of the negligent way in which the indictment was drawn, he was not entitled to recover his disbursements.<sup>75</sup>

The duty of the principal to indemnify the agent against losses and liabilities which are the consequences of the acts done by him in the execution of the agency rests upon the same ground.<sup>76</sup> If the proper execution of the agency involves or may involve acts from which loss or liability may result, the request to undertake the agency operates as an implied promise to indemnify the agent against such loss or liability.<sup>77</sup> Thus, where an agent sold cotton and was obliged to refund the price to the purchaser on account of false packing by the principal, he was allowed to recover from him the amount so refunded.<sup>78</sup> If, in the proper execution of his authority, the agent becomes personally liable upon a contract made for his principal, the agent can look to the principal for any damages sustained in consequence.<sup>79</sup> So, if an agent, without notice of adverse title, sells goods under instructions from his principal, who claims them as owner, and is compelled to pay to the true owner the value of the goods, the agent is entitled to indemnity;<sup>80</sup> and where an agent is authorized to deal in a

<sup>74</sup> *Lewis v. Samuel*, 8 Q. B. 685, 115 Rep. 1031 (1846); *Veltum v. Koehler*, 85 Minn. 125, 88 N. W. 432 (1901); *Mills Nov. Co. v. Dupouy*, 203 Fed. 254, 121 C. A. 452, 45 L. R. A. (N. S.) 788 (1913).

Cf. *Herrman v. Leland*, 84 Misc. Rep. 82, 145 N. Y. Supp. 972 (1914).

<sup>75</sup> *Lewis v. Samuel*, 8 Q. B. 685, 115 Rep. 1031 (1846).

<sup>76</sup> *BIBB v. ALLEN*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819, Powell, Cas. Agency, 390 (1893).

<sup>77</sup> *Powell v. Trustees*, 19 Johns. 284 (N. Y. 1822); *Saveland v. Green*, 36 Wis. 612 (1875); *Maitland v. Martin*, 86 Pa. 120 (1878); *Denney v. Wheelwright*, 60 Miss. 733 (1883).

Cf. *Halbronn v. International Horse Agency*, [1903] 1 K. B. 270.

<sup>78</sup> *Beach v. Branch*, 57 Ga. 362 (1876).

<sup>79</sup> *Greene v. Goddard*, 50 Mass. (9 Metc.) 212 (1845); *Dozier v. Davison & Fargo*, 138 Ga. 190, 74 S. E. 1086 (1912).

<sup>80</sup> *Adamson v. Jarvis*, 4 Bing. 66, 130 Rep. 693 (1827). See, also,

particular market or trade, he is thereby authorized to deal according to the established usage thereof, provided the usage is reasonable, and not inconsistent with his instructions; and if, in accordance with such usage, he incurs expenses or liability, he is entitled to be reimbursed and indemnified on that account.<sup>81</sup> Thus, where brokers were compelled by the rules of the New York Cotton Exchange, of which the principal had notice, to go into the market and buy cotton to cover their contracts for future delivery on their principal's account, by reason of his failure to furnish margins, the brokers were entitled to recover the difference between the price at which the cotton was to be sold and the increased price so paid to cover the contracts.<sup>82</sup> No indemnity can be recovered for a loss incurred in consequence of the agent's negligence or breach of duty.<sup>83</sup>

#### MACHINERY FOR ENFORCEMENT OF ABOVE DUTIES—RIGHTS IN LITIGATION

157. The agent may enforce these duties in an action at law against his principal, or by way of defense or counterclaim, if sued by his principal. If the accounts are complicated, the agent may have an account directed in equity.

Drummond v. Humphreys, 39 Me. 347 (1855); Hoggan v. Cahoon, 26 Utah, 444, 73 Pac. 512, 99 Am. St. Rep. 837 (1903).

<sup>81</sup> Chapman v. Shepherd, L. R. 2 C. P. 228 (1867); Talcott v. Smith, 142 Mass. 542, 8 N. E. 413 (1886); Rodman v. Weinberger, 81 N. J. Law, 441, 79 Atl. 338 (1910).

<sup>82</sup> BIBB v. ALLEN, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819. Powell, Cas. Agency, 390 (1893).

<sup>83</sup> Haskin v. Haskin, 41 Ill. 197 (1866); Baily v. Burgess, 48 N. J. Eq. 411, 22 Atl. 733 (1891).

Where a stockbroker was instructed to carry over stock to the next settlement, but before the settling day became insolvent and was declared a defaulter, in consequence of which the stock was sold at a loss, the principal was not bound to indemnify him, the loss having been caused by the broker's insolvency. Duncan v. Bee-  
son, L. R. 8 Ex. 242 (1873). In re Lathrop, Haskins & Co., 216 Fed. 102, 132 C. C. A. 346 (1914).

Cf. Herrman v. Leland, 84 Misc. Rep. 82, 145 N. Y. Supp. 972 (1914).

It follows, from what has been said, that the agent has a right to recover from his principal whatever may be due him on account of his remuneration, reimbursement, or indemnity by action at law; and he may avail himself of any such claims or demands, when sued for the funds of his principal in his hands, by way of recoupment, set-off, or counterclaim.<sup>84</sup> In a proper case he may have an accounting in a court of equity;<sup>85</sup> but the right on the part of the agent to an accounting in equity, unlike the right of the principal to such an accounting,<sup>86</sup> arises only when the accounts are of so complicated a nature that they cannot be properly and conveniently gone into by a jury,<sup>87</sup> or some other independent ground of equity jurisdiction exists.<sup>88</sup>

#### MACHINERY FOR ENFORCEMENT OF ABOVE DUTIES—LIEN—EXTENT

158. An agent's claim against his principal, in the absence of agreement to the contrary, is protected by a lien upon the goods, chattels, and funds of the principal, which have come into the agent's possession lawfully. This lien is usually a particular lien, but may become a general lien, either by express agreement or established business usage.

In addition to his personal remedies for the recovery of his remuneration, reimbursement, and indemnity, the agent has the right of lien. A lien at common law may be defined as the right to retain possession of a thing until a debt due to the person retaining possession is satisfied. A

<sup>84</sup> Story, Ag. § 350.

<sup>85</sup> Padwick v. Hurst, 18 Beav. 575, 52 Rep. 225 (1854).

<sup>86</sup> See section 147, *supra*.

<sup>87</sup> Padwick v. Hurst, 18 Beav. 575, 52 Rep. 225 (1854); Johnston v. Berlin, 35 Misc. Rep. 146, 71 N. Y. Supp. 454 (1901).

<sup>88</sup> Cal. Raisin Growing Ass'n v. Abbott, 160 Cal. 601, 117 Pac. 767 (1911); Davis v. Marshall, 114 Va. 193, 76 S. E. 316, Ann. Cas. 1914B, 1025 (1912).

lien may be particular or general. Where the right is to retain the thing which is the subject of the lien for charges or demands growing out of or connected with that identical thing, the lien is particular. Where the right is to retain the thing, not only for charges or demands growing out of or connected with that particular thing, but for a general balance due from the owner, the lien is general. Unless there is an express or implied agreement to the contrary, an agent has a particular lien upon the goods, chattels, and funds of his principal intrusted to him in the course of the agency or rightfully coming into his possession as agent. The lien of the agent is merely a particular lien, unless there is an express agreement for a general lien, or unless an agreement for a general lien is to be implied from a previous course of dealing or established business usage.<sup>89</sup> Thus an auctioneer has a particular lien upon the goods intrusted to him for sale and upon their proceeds for his commissions and the charges of sale;<sup>90</sup> a broker employed to procure a loan has a particular lien for his commissions upon the proceeds of the loan;<sup>91</sup> but neither has a general lien. On the other hand, factors,<sup>92</sup> insurance brokers,<sup>93</sup> solicitors and attorneys,<sup>94</sup> bankers,<sup>95</sup> and some other classes of agents,<sup>96</sup> have a general lien. The general lien of these classes of agents has its origin in the general usage of

<sup>89</sup> *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291 (1842).

<sup>90</sup> *Robinson v. Rutter*, 4 El. & B. 954, 119 Rep. 355 (1855).

<sup>91</sup> *Vinton v. Baldwin*, 95 Ind. 433 (1884).

An agent who obtains possession from carrier by paying freight has lien for reimbursement. *White v. Railway Co.*, 90 Ala. 253, 7 South. 910 (1889).

<sup>92</sup> See cases in footnote 98, p. 432, *infra*.

<sup>93</sup> *Westwood v. Bell*, 4 Camp. 349 (1815); *Moody v. Webster*, 20 Mass. (3 Pick.) 424 (1826); *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291 (1842).

<sup>94</sup> See cases in footnotes 3, 4, p. 433, *infra*.

<sup>95</sup> See cases in footnote 1, p. 432, *infra*.

<sup>96</sup> Wharfingers: *Vaylor v. Mangles*, 1 Esp. 109 (1794); *SPEARS v. HARTLY*, 3 Esp. 81, *Powell, Cas. Agency*, 399 (1800).

Packers: *In re Witt, L. R. 2 Ch. D.* 489 (1876).

trade, which has become so fixed that the courts take notice of it without proof. A general lien is sometimes conferred upon certain classes of agents by statute.<sup>97</sup> A consideration of liens peculiar to these various classes of agents is beyond the scope of this book, but a few words may be said as to the lien of factors, bankers, and attorneys.

A factor has a general lien upon the goods of his principal in his possession and upon the proceeds of such as are lawfully sold by him, and upon the securities given therefor, for the general balance of the accounts between him and his principal, as well as for his charges, advances, and obligations made or incurred upon the particular goods.<sup>98</sup> The lien extends to all sums for which he has become liable as surety.<sup>99</sup>

A banker has a general lien upon all notes, bills, checks, and other securities deposited with him by his customer for the balance due him upon general account.<sup>1</sup> Indeed, the right of the banker in respect to securities indorsed or otherwise negotiated and deposited with him is greater than that of a mere possessory lien, since he is, in effect, a holder for value to the extent of all advances and acceptances, present and future, made by him for his customer in excess of the cash balance which may stand to his credit, and the banker may sue and recover upon the securities, at least to the amount of the balance due him.<sup>2</sup>

An attorney at law or solicitor has a general lien upon all documents and papers, chattels and money, belonging to his client, of which he obtains possession in his profes-

<sup>97</sup> Story, Ag. § 375.

<sup>98</sup> Stevens v. Biller, L. R. 25 Ch. D. 31 (1883); Nagle v. McFeeters, 97 N. Y. 196 (1884); McGraft v. Rugee, 60 Wis. 406, 19 N. W. 530, 50 Am. Rep. 378 (1884).

<sup>99</sup> Drinkwater v. Goodwin, Cowp. 251, 98 Rep. 1070 (1775). See Hidden v. Waldo, 55 N. Y. 294 (1873).

<sup>1</sup> Story, Ag. § 380; London Chartered Bank v. White, L. R. 4 App. Cas. 413 (1879).

<sup>2</sup> Scott v. Franklin, 15 East, 428, 104 Rep. 906 (1815).

sional capacity.<sup>3</sup> In addition to his general or retaining lien, an attorney has a so-called "charging" lien upon any judgment obtained by him for his client, for his costs and disbursements incurred in the particular action, which by the aid of the court he may actively enforce.<sup>4</sup> To a great extent the second lien, and to some extent the first, are regulated by statute.<sup>5</sup>

The existence of a general lien, however, as well as of a particular lien, may be disproved by proof of an express or implied agreement inconsistent with it.<sup>6</sup> The rules which will be stated in the succeeding sections are applicable to both classes of liens.

#### MACHINERY FOR ENFORCEMENT OF ABOVE DUTIES—LIEN—CONDITIONS PRE- CEDENT

159. Such lien either particular or general can exist only when—

- (1) The agent has lawful possession of the article against which the lien is claimed; and
- (2) Such possession has been obtained by the agent in the same capacity as that in which the agent claims the lien; and
- (3) No agreement of the agent clearly inconsistent with such lien exists; and
- (4) The ownership of the article against which the lien is claimed is in the principal; and
- (5) The claim is certain and liquidated.

<sup>3</sup> *In re Paschal*, 77 U. S. (10 Wall.) 483, 19 L. Ed. 992 (1870); *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489 (1873); *McPher-son v. Cox*, 96 U. S. 404, 24 L. Ed. 746 (1877); *In re Knapp*, 85 N. Y. 284 (1881); *Hurlbert v. Brigham*, 56 Vt. 368 (1883).

<sup>4</sup> *Barker v. St. Quentin*, 12 M. & W. 441, 152 Rep. 1270 (1844); *Cohen v. Goldberger*, 141 N. E. 656 (Ohio, 1923).

<sup>5</sup> See Jones, *Liens*, § 113 et seq., and section 153 et seq.

<sup>6</sup> See cases in footnotes 18–26, pp. 425, 436, *infra*.

The lien, being possessory, cannot come into existence unless the agent obtains possession.<sup>7</sup> Thus, where a factor bought goods on behalf of his principal, but it was agreed that the goods should remain upon the premises of the seller at a rent to be paid by the principal, and the agent upon request of the seller, but without authority from his principal, removed the goods to his own premises, the possession continued in the principal, and the agent was not entitled to a lien.<sup>8</sup> So, where a factor accepted bills upon the faith of a consignment, and both he and the principal became bankrupt before arrival of the goods, the factor's trustee in bankruptcy had no lien, the goods having never been in the factor's possession.<sup>9</sup> Constructive possession, however, is sufficient.<sup>10</sup> The lien does not come into existence, unless the thing upon which it is sought to be asserted is obtained by the agent lawfully. A lien cannot be acquired by a wrongful or unauthorized act. Thus an agent can have no lien upon goods which he obtains from his principal by misrepresentation.<sup>11</sup>

Possession must have been obtained in the same capacity in which the agent claims the lien.<sup>12</sup> The lien is confined, not only to what is due to him as agent, but to what is due him as agent in the capacity in which he claims the lien. "A man is not entitled to a lien because he happens to fill a character which gives him such a right, unless he has received the goods, or done the act, in the particular character to which the right attaches."<sup>13</sup> Thus, the lien does

<sup>7</sup> *Kinloch v. Craig*, 3 T. R. 119, 783, 100 Rep. 487, 858 (1789, 1790); *Taylor v. Robinson*, 2 Moore, 730 (1818); *Elliot v. Bradley*, 23 Vt. 217 (1851); *Sawyer v. Lorillard*, 48 Ala. 332 (1872).

<sup>8</sup> *Taylor v. Robinson*, 2 Moore, 730 (1818).

<sup>9</sup> *Kinloch v. Craig*, 3 T. R. 119, 783, 100 Rep. 487, 858 (1789, 1790).

<sup>10</sup> *Elliot v. Bradley*, 23 Vt. 217 (1851); *Heard v. Brewer*, 4 Daly, 136 (N. Y. 1871).

<sup>11</sup> *Madden v. Kempster*, 1 Camp. 12 (1807).

<sup>12</sup> *Houghton v. Matthews*, 3 B. & P. 485, 127 Rep. 263 (1803); *Dixon v. Stansfeld*, 10 C. B. 398, 138 Rep. 160 (1850).

<sup>13</sup> Per Jervis, C. J., in *Dixon v. Stansfeld*, 10 C. B. 398, at page 418, 138 Rep. 160 (1850).

not extend to a debt incurred before the commencement of the agency.<sup>14</sup> So the general lien of a factor, or solicitor, or banker, does not extend to a thing of which he obtains possession as agent in another capacity.<sup>15</sup> If a factor insures a ship on behalf of his principal, a transaction which is separate from his duties as factor, his general lien does not extend to the policy of insurance, because he does not obtain possession in his capacity as factor.<sup>16</sup> So securities or valuables left with a banker for safe custody are not subject to his general lien, which is confined to what is deposited with him in his capacity as banker.<sup>17</sup>

Neither does the lien come into existence if there is an agreement, express or implied, clearly inconsistent with its existence.<sup>18</sup> Thus, if a factor agrees to deal with the proceeds of goods in a particular way, his general lien is excluded.<sup>19</sup> So, where an insurance policy was deposited with bankers, with an agreement charging it with over-drafts not to exceed a specified amount, the bankers' general lien was excluded.<sup>20</sup> To exclude the lien, however, it must appear that the agreement is clearly inconsistent.<sup>21</sup> The lien is excluded by implication, if the property is de-

<sup>14</sup> Houghton v. Matthews, 3 B. & P. 485, 127 Rep. 263 (1803).

<sup>15</sup> Stevenson v. Blakelock, 1 M. & S. 535, 105 Rep. 200 (1813); Dixon v. Stansfeld, 10 C. B. 398, 138 Rep. 160 (1850); In re Galland, L. R. 31 Ch. D. 296 (1885).

<sup>16</sup> Dixon v. Stansfeld, 10 C. B. 398, 138 Rep. 160 (1850).

<sup>17</sup> No lien on muniments of title casually left at bank after refusal to loan thereon. Lucas v. Dorrien, 7 Taunt. 278, 129 Rep. 112 (1817).

<sup>18</sup> Cowell v. Simpson, 16 Ves. 275, 33 Rep. 989 (1809); Gilman v. Brown, 1 Mason, 191, Fed. Cas. No. 5,441 (1817).

<sup>19</sup> Walker v. Birch, 6 T. R. 258, 101 Rep. 541 (1795).

<sup>20</sup> In re BOWES, L. R. 33 Ch. D. 586, Powell, Cas. Agency, 396 (1886).

<sup>21</sup> Brandao v. Barnett, 12 C. & F. 787, 3 C. B. 519, 136 Rep. 207 (1846); Fisher v. Smith, L. R. 4 App. Cas. 1 (1878), agreement for monthly settlement does not affect lien of insurance broker for premiums, on policies in his hands; Stevens v. Biller, L. R. 25 Ch. D. 31 (1883), general lien of factor not excluded because he acts under special instructions to sell in principal's name and at fixed price;

livered to the agent with express directions, or for a special purpose, inconsistent with its existence.<sup>22</sup> Thus, if an agent accepts goods, with directions to hold them, or to apply their proceeds, subject to the order of, or to deliver them to, a third person, he cannot set up his general lien in opposition to the directions.<sup>23</sup> So, where exchequer bills were deposited at a bank to be kept in a box under lock and key, and were afterwards intrusted to the banker with instructions to obtain the interest on them, and to get them exchanged for new bills, and to deposit the new bills in the boxes as before, it was held that the banker's lien did not attach upon the old or the new bills; the special purpose for which they were intrusted to him being inconsistent with a general lien.<sup>24</sup> As in the case of the lien of the seller, giving credit or accepting a negotiable instrument in conditional payment,<sup>25</sup> is a waiver of the lien, which revives, however, if the goods still remain in the agent's possession when the credit expires or the paper is dishonored.<sup>26</sup>

*Haebler v. Luttgen*, 61 Minn. 315, 63 N. W. 720 (1895). *Welker v. Appleman*, 44 Ind. App. 699, 90 N. E. 35 (1909). See *Bowstead, Dig. Ag.* (1919 Ed.) art. 72.

<sup>22</sup> *In re Cullen*, 27 Beav. 51, 54 Rep. 20 (1859), money received by solicitor to pay off mortgage.

Where goods were consigned to a factor for sale, with a statement that the goods would cover a bill of exchange in favor of a third person, and with a request to honor the bill, and the factor refused to accept the bill on presentation, the goods were appropriated to meet it, and the third person had a lien therefor in priority to the factor's general lien. *Frith v. Forbes*, 4 De Gex, F. & J. 409, 45 Rep. 1242 (1862).

<sup>23</sup> *Walker v. Birch*, 6 T. R. 258, 101 Rep. 541 (1795); *Jarvis v. Rogers*, 15 Mass. 389, 395 (1819).

<sup>24</sup> *Brandao v. Barnett*, 12 C. & F. 787, 3 C. B. 519, 136 Rep. 207 (1846).

<sup>25</sup> *Cowell v. Simpson*, 16 Ves. 275, 33 Rep. 989 (1809); *Chandler v. Belden*, 18 Johns. 157, 9 Am. Dec. 193 (N. Y. 1820); *Au Sable River Boom Co. v. Sanborn*, 36 Mich. 358 (1877). *Jones, Liens*, § 1003.

<sup>26</sup> *Stevenson v. Blakelock*, 1 M. & S. 535, 105 Rep. 200 (1813).

Cf. *Au Sable River Boom Co. v. Sanborn*, 36 Mich. 358 (1877).

In order that the agent may acquire a lien, not only must the possession be in him, but the ownership must be in the principal. The lien can attach only upon a thing in respect to which, as against third persons, the principal has a right to create a lien.<sup>27</sup> If, when the thing comes into the agent's possession, the ownership of the principal has been divested, no lien can arise.<sup>28</sup> On the other hand, if the lien has once attached, it cannot be affected by any subsequent act of the principal or by his bankruptcy.<sup>29</sup> The rule that the thing upon which the lien attaches must be owned by the principal does not apply to money and negotiable instruments, the usual privileges attaching to negotiable paper in favor of bona fide purchasers for value without notice protecting the agent to the extent of his lien.<sup>30</sup>

The lien usually attaches only to certain and liquidated demands, and not to those which sound only in damages and can be ascertained only through the intervention of a jury. Hence the lien does not extend to a demand for an indemnity against future contingent claims or damages.<sup>31</sup> Such a lien can be created only by special contract, or special usage, as in the case of the attorney's lien for services rendered.<sup>32</sup> But the obligation need not be due. Thus a factor, or other agent, who has accepted bills on the faith of a consignment or of goods in his possession, has a lien for the amount of bills not yet due as well as of those which he has paid.<sup>33</sup>

<sup>27</sup> No lien can attach on the books of a company, because the directors have no power to create a lien that could interfere with their use. *In re Capital Fire Ins. Ass'n*, L. R. 24 Ch. D. 408 (1883).

<sup>28</sup> *Copland v. Stein*, 8 T. R. 199, 101 Rep. 1344 (1799), goods consigned to factor after bankruptcy of principal.

<sup>29</sup> *Robson v. Kemp*, 4 Esp. 233 (1803).

<sup>30</sup> *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 21, 10 L. Ed. 865 (1842); *Misa v. Currie*, L. R. 1 App. Cas. 554 (1876).

<sup>31</sup> *Story, Ag.* § 364.

<sup>32</sup> See cases in footnote 3, p. 433, *supra*.

<sup>33</sup> *In re Pavy's Pat. F. F. Co.*, L. R. 1 Ch. D. 631 (1876). See cases in footnote 98, p. 432, *supra*.

## MACHINERY FOR ENFORCEMENT OF ABOVE DUTIES—LIEN—END AND ENFORCEMENT

160. The lien may end by the agent parting with possession of the article against which it is claimed, or by express agreement, or by agreement inconsistent with its continuance. Such lien generally gives the agent merely the right to retain, but in some cases carries also a right to sell.

The lien is terminated if the agent voluntarily gives up possession,<sup>34</sup> unless he is induced to do so by fraud<sup>35</sup> or mistake, or possession is obtained from him illegally.<sup>36</sup> But, although the agent parts with possession by making an authorized sale of goods, the lien attaches to the proceeds of sale.<sup>37</sup> The agent abandons his lien, even if his transfer of possession be wrongful, as when he tortiously sells or pledges goods, for advances made, to himself,<sup>38</sup> or causes them to be taken on execution at his own suit.<sup>39</sup> On the other hand, he may pledge the goods as security to the extent of the amount due him, for which he has a lien, if he notifies the pledgee that he is to hold only for the lien; the constructive possession in that case continuing in the agent, and the pledgee having, in effect, a mere custody.<sup>40</sup>

<sup>34</sup> Sweet v. Pym, 1 East, 4, 102 Rep. 2 (1800), delivery to carrier for principal; Rosenbaum v. Hayes, 8 N. D. 461, 79 N. W. 987 (1899).

<sup>35</sup> Wallace v. Woodgate, 1 C. & P. 575, R. & M. 193 (1824); Bigelow v. Heaton, 6 Hill, 43 (N. Y. 1843).

<sup>36</sup> Dicas v. Stockley, 7 C. & P. 587 (1836).

<sup>37</sup> See cases in footnote 98, p. 432, *supra*.

<sup>38</sup> McCombie v. Davies, 7 East, 6, 103 Rep. 3, (1805); Jarvis v. Rogers, 15 Mass. 389, 396 (1819); Walker Co. v. Produce Co., 113 Iowa, 428, 85 N. W. 614, 53 L. R. A. 775 (1901), sale amounting to conversion.

<sup>39</sup> Jacobs v. Latour, 5 Bing. 130, 130 Rep. 1010 (1828).

<sup>40</sup> McCombie v. Davies, 7 East, 6, 103 Rep. 3 (1805); Urquhart v. McIver, 4 Johns. 103 (N. Y. 1809); Jarvis v. Rogers, 15 Mass. 389, 408 (1819); Nash v. Mosher, 19 Wend. 431 (N. Y. 1838).

Again, the agent may expressly waive his lien, or may waive it by entering into an agreement which is inconsistent with its continuance.<sup>41</sup> Taking other security for the debt or obligation is an abandonment,<sup>42</sup> provided the nature of the security and the circumstances under which it is taken are inconsistent with its continuance, or indicate an intention to abandon it.<sup>43</sup> The lien is also lost by entering into a relation or acting in a capacity which is inconsistent with its continuance.<sup>44</sup>

The lien does not terminate upon the death of the principal,<sup>45</sup> nor does it cease because the debt or obligation is barred by the statute of limitations.<sup>46</sup>

The lien is lost by a wrongful refusal to deliver, as where the agent refuses to deliver under claim of right not based upon his lien.<sup>47</sup>

The lien ordinarily amounts to no more than a right of retainer. The agent may assert the right as a defense if his possession is attacked, and may reclaim the thing if he is unlawfully dispossessed; but he cannot sell or dispose of the thing to satisfy his claim.<sup>48</sup> An exception exists in favor of a factor who has made advances upon goods consigned to him, giving to him a right to sell if, upon notice,

<sup>41</sup> Sawyer v. Lorillard, 48 Ala. 332 (1872).

<sup>42</sup> Cowell v. Simpson, 16 Ves. 275, 33 Rep. 989 (1809).

<sup>43</sup> Angus v. McLachlan, L. R. 23 Ch. D. 330 (1883); In re Taylor, [1891] 1 Ch. 590. See Jones, Liens, § 1011.

<sup>44</sup> In re Nicholson, Ex parte Quinn, 53 L. J. Ch. 302 (1883), solicitor acting for mortgagor and mortgagee, loses lien on title deeds; Mack v. Schuykill Trust Co., 33 Pa. Super Ct. 128 (1907).

<sup>45</sup> Hammonds v. Barclay, 2 East, 227, 102 Rep. 356 (1802); Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 45 (1837).

<sup>46</sup> SPEARS v. HARTLY, 3 Esp. 81, Powell, Cas. Agency, 399 (1800); Re Broomhead, 16 L. J. Q. B. 355 (1847).

<sup>47</sup> Jones, Liens, § 1018 et seq.

<sup>48</sup> Story, Ag. § 371; Jessen Liquor Co. v. Phoenix Dist. Co., 171 Iowa, 505, 153 N. W. 148 (1915); East v. Southern Cotton Oil Co., 126 Ark. 462, 190 S. W. 558 (1916).

But see Dewing v. Hutton, 40 W. Va. 521, 21 S. E. 780 (1895).

his principal does not repay him.<sup>49</sup> In some cases a court of equity will decree a sale.<sup>50</sup>

### MACHINERY FOR ENFORCEMENT OF ABOVE DUTIES—STOPPAGE IN TRANSITU

161. Where an agent has bought goods for his principal with his own money or credit, he has, as against his principal, the same right of stoppage in transitu that he would have if he were an unpaid seller.

On account of its intrinsic justice, the courts are inclined to look with favor upon the right of stoppage in transitu, and to extend it to any one whose position is substantially that of an unpaid seller. Hence the right may be exercised by a consignor, factor, or other agent who has bought goods for his principal with his own money or credit, if the other conditions exist, which would entitle an unpaid seller to exercise the right.<sup>51</sup> Where the agent is thus in the position of unpaid seller, he has ordinarily, indeed, before delivering the goods to the carrier for transmission to the principal, more than a mere agent's lien, or even seller's lien, retaining not merely possession of the goods, but the property in them.<sup>52</sup> In such case it would seem that, al-

<sup>49</sup> Walker Co. v. Produce Co., 113 Iowa, 428, 85 N. W. 614, 53 L. R. A. 775 (1901). See, also, cases in footnote 44, p. 376, of chapter XV.

<sup>50</sup> Story, Ag. § 371; Whitman v. Horton, 46 N. Y. Super. Ct. 531 (1880); Id., 94 N. Y. 644 (1884), factor.

<sup>51</sup> Feise v. Wray, 3 East, 93, 102 Rep. 532 (1802); SEYMOUR v. NEWTON, 105 Mass. 272, 275, Powell, Cas. Agency, 400 (1870); Muller v. Pondir, 55 N. Y. 325, 14 Am. Rep. 259 (1873); Imperial Bank v. London & St. Katharine's Docks, L. R. 5 Ch. D. 195 (1877). See, also, Hollins v. Hubbard, 165 N. Y. 534, 59 N. E. 317 (1901).

Otherwise, where an agent having a lien for advances ships at his principal's request to a buyer. Gwyn v. Railroad Co., 85 N. C. 429, 39 Am. Rep. 708 (1881). See Tiffany, Sales (1908 Ed.) p. 324.

<sup>52</sup> Shepherd v. Harrison, L. R. 4 Q. B. 196, 493, 5 H. L. 116 (1869); Farmers' & Mechanics' Nat. Bank v. Logan, 74 N. Y. 568 (1878); Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818 (1887).

though shipment of the goods (if without reservation of the right of disposal) would be an appropriation to the contract, he would, upon regaining possession by exercise of the right of stoppage, be entitled to hold them subject to a seller's lien,<sup>53</sup> with a right of resale. On the other hand, if upon shipment he reserved the right of disposal, by taking a bill of lading to his own order or otherwise, so that the appropriation was only conditional, he would, upon recovering the actual possession of the goods upon non-fulfillment of the condition to which the appropriation was subject, be restored to his rights of ownership.<sup>54</sup>

#### RESTRICTIONS ON ENFORCEMENT OF ABOVE DUTIES—ILLEGAL TRANSACTIONS

162. An agent is not entitled to remuneration, reimbursement, or indemnity in respect to any transaction which is apparently, or to his knowledge, illegal.

An agent, as a rule, cannot recover compensation for acts done in violation of law. If a statute or ordinance makes it unlawful for a particular class of agents to transact business without a license, such agent, so transacting business, cannot recover commissions for his services.<sup>55</sup> If the object of the agency is the performance of an apparently illegal act, the contract of employment is void, and there can be no recovery.<sup>56</sup> Some examples of illegal agencies have

<sup>53</sup> Tiffany, Sales (1908 Ed.) p. 379 ff.

<sup>54</sup> Tiffany, Sales (1908 Ed.) p. 342 ff.

<sup>55</sup> See cases in footnotes 80, 81, in section 77, p. 193, *supra*.

In *Smith v. Lindo*, 5 C. B. (N. S.) 587, 141 Rep. 237 (1858), it was held that, although an unlicensed broker could not sue for commission, he might recover money which he had been obliged to pay.

<sup>56</sup> Procuring government contracts by personal influence or corrupt means: *PROVIDENCE TOOL CO. v. NORRIS*, 69 U. S. (2 Wall.) 45, Powell, Cas. Agency, 174, 17 L. Ed. 868 (1864); Oscanyan

already been given.<sup>57</sup> Since ignorance of the law is no excuse, if the act or transaction for which the agent is employed is prohibited at common law, or by statute or public policy, there can be no recovery, notwithstanding that the agent is ignorant of the law, provided he has sufficient knowledge of the facts to be charged with knowledge that the act or transaction is illegal. Thus, an agent who is employed to sell intoxicating liquor where such sale is illegal cannot recover remuneration under any circumstances.<sup>58</sup> On the other hand, an agent who is employed in a transaction which is apparently legal may recover remuneration, notwithstanding that by reason of facts of which he is ignorant the act is illegal. Thus an agent employed to sell goods, who is ignorant of the fact that they belong to a person other than his principal, may recover compensation, notwithstanding that his sale was a conversion.<sup>59</sup> So a broker who in good faith negotiates a contract for future delivery of merchandise will be allowed to recover his commissions, notwithstanding the actual intent of the parties to speculate in margins without actual delivery, and the consequent illegality of the transaction as a gaming or wagering contract, provided he is not privy to the illegal character of the agreement, although if he is privy to the unlawful design, and brings the parties together for the

v. Arms Co., 103 U. S. 261, 26 L. Ed. 539 (1880); Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746 (1884).

Cf. Reinhard v. Grand Rapids S. E. Co., 211 Mich. 165, 178 N. W. 718 (1920).

On appointment to office: Gray v. Hook, 4 N. Y. 449 (1851); McGuire v. Corwine, 101 U. S. 108, 25 L. Ed. 899 (1879).

Lobbying: Trist v. Child, 88 U. S. (21 Wall.) 441, 22 L. Ed. 623 (1874); McBratney v. Chandler, 22 Kan. 692, 31 Am. Rep. 213 (1879).

Combination to corner market: Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499 (1889).

Race track betting: Cahill v. Gilman, 84 Misc. Rep. 372, 146 N. Y. Supp. 224 (1914).

<sup>57</sup> See section 66, *supra*.

<sup>58</sup> Bixby v. Moor, 51 N. H. 402 (1871).

<sup>59</sup> See cases in footnote 63, p. 443, *infra*.

purpose of entering into an illegal agreement, he is particeps criminis, and cannot recover.<sup>60</sup>

The same distinctions govern the right of the agent to recover reimbursement and indemnity. If the transaction is apparently or to his knowledge illegal, he cannot recover; but, if otherwise, he can.<sup>61</sup> Thus a broker who effects illegal insurance cannot recover the premiums which he has paid.<sup>62</sup> An agent employed to sell goods which he knows to belong to a third person, or to commit a trespass upon land, cannot recover indemnity if he is compelled to respond in damages to the owner of the goods or of the land; but if he has no knowledge of the adverse title, and sells the goods or enters upon the land under direction of his principal, who claims as owner, and a recovery is subsequently had against him for damages for the conversion or trespass, he is entitled to indemnity.<sup>63</sup> So, if a broker in good faith negotiates a contract for future delivery of merchandise under the circumstances mentioned in the last paragraph, he may recover reimbursement for his advances or indemnity for liability which he has incurred in execution of the authority, notwithstanding that by reason of the illegal intent of the parties to which he was not privy

<sup>60</sup> *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225 (1884); *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159 (1889); *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. 862 (1891); *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403 (1893).

Gaming and wagering contracts in the United States generally are held to be illegal as against public policy. *Irwin v. Williar*, *supra*, and cases cited.

<sup>61</sup> *BIBB v. ALLEN*, 149 U. S. 498, 13 Sup. Ct. 950, 37 L. Ed. 819, Powell, Cas. Agency, 390 (1893).

<sup>62</sup> *Ex parte Mather*, 3 Ves. 373, 30 Rep. 1060 (1797); *Allkins v. Jupe*, L. R. 2 C. P. D. 375 (1877).

<sup>63</sup> *Drummond v. Humphreys*, 39 Me. 347 (1855), cutting timber on land not owned by principal; *Moore v. Appleton*, 26 Ala. 633 (1855); *Howe v. Railroad Co.*, 37 N. Y. 297 (1867).

"Every man who employs another to do an act which the employer appears to have a right to authorize him to do undertakes to indemnify him from all such acts as would be lawful if the employer had the authority he pretends to have." *Adamson v. Jarvis*, per Best, C. J., 4 Bing. 66, 130 Rep. 693 (1827).

the transaction is illegal, but if he is privy thereto he cannot recover.<sup>64</sup>

### RESTRICTIONS ON ENFORCEMENT OF ABOVE DUTIES—BY SUBAGENT

163. A subagent is entitled to remuneration, reimbursement, and a lien to enforce them, as against the principal, only when the agent was authorized to delegate his authority and to create privity of contract between the subagent and principal. In such a case, if the subagent knows of P.'s existence, he has a particular lien, but cannot have a general lien as against the principal for sums due him from the agent in excess of the sum due to the agent from the principal. In all other cases the subagent's claims are enforceable solely against the agent.

Where a subagent is employed without authority of the principal, since no privity of contract exists between them, the subagent must look solely to his immediate employer for compensation, reimbursement, and indemnity, and has no lien general or particular against the principal.<sup>65</sup> Thus, if a factor, without the assent of his principal delegates his authority to another, the latter has no lien, even for duties paid upon the goods.<sup>66</sup> Even if the employment is authorized, the right of the subagent to look to the principal will depend upon whether the agent was authorized to employ the subagent upon the principal's behalf and to create priv-

<sup>64</sup> Cases cited in note 60, p. 443, supra.

<sup>65</sup> Schmalong v. Thomlinson, 6 Taunt. 147, 128 Rep. 989 (1815); Cleaves v. Stockwell, 33 Me. 341 (1851); Hibbard v. Peek, 75 Wis. 619, 44 N. W. 641 (1890); Ward v. Still, 72 Pa. Super. Ct. 48 (1919); James Bradford Co. v. Ed. Hill's Son & Co., 116 Atl. 353 (Del. 1922).

<sup>66</sup> SALLY v. RATHEBONE, 2 M. & S. 298, 105 Rep. 392, Powell, Cas. Agency, 401 (1814); Meyers & Bro. v. Bratespiece, 174 Pa. 119, 34 Atl. 551 (1896).

ity of contract between them, or was merely authorized to employ a subagent on his own behalf and responsibility.<sup>67</sup> In the first case the subagent can look to the principal,<sup>68</sup> but in the latter he can look only to the agent.<sup>69</sup> The same principles apply where the authority of an agent to employ a subagent is derived from ratification.<sup>70</sup> If the employment purported to be of the subagent as agent of the principal, ratification with knowledge that such was the employment would create privity of contract, and render the principal liable to the subagent;<sup>71</sup> but, if the employment was upon behalf of the agent, ratification would have no such effect.<sup>72</sup>

If, however, the employment of the subagent is authorized, he will be entitled to a lien, the nature and extent of which depends upon whether, at the time of his appointment, he knows or has reason to know that the agent employing him is not acting on his own behalf.<sup>73</sup> If the subagent has notice that his immediate employer is not so acting, he has, nevertheless, as against the principal, a particular lien;<sup>74</sup> but he has, strictly speaking, no general lien.<sup>75</sup> He may, however, if the agent has a lien, general

<sup>67</sup> See section 83, supra.

<sup>68</sup> Lincoln v. Battelle, 6 Wend. 475 (N. Y. 1831); McConnell v. McCormick, 12 Cal. 142 (1859); Keay v. Fenwick, L. R. 1 C. P. D. 745 (1876); Cotton States Life Ins. Co. v. Mallard, 57 Ga. 64 (1876).

Unless exclusive credit is given to the principal, the agent also is liable. Story, Ag. §§ 386, 387; Miles v. Mays, 15 Colo. 133, 25 Pac. 312 (1890).

<sup>69</sup> Corbett v. Schumacker, 83 Ill. 403 (1876).

<sup>70</sup> See cases in footnote 32, p. 211, chapter X, supra.

<sup>71</sup> Keay v. Fenwick, L. R. 1 C. P. D. 745 (1876). See, also, Dewing v. Hutton, 48 W. Va. 576, 37 S. E. 670 (1900).

<sup>72</sup> Homan v. Insurance Co., 7 Mo. App. 22 (1879).

<sup>73</sup> See Bowstead, Dig. Ag. (1919 Ed.) art. 74; Story, Ag. §§ 389, 390.

<sup>74</sup> McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291 (1842); Fisher v. Smith, L. R. 4 App. Cas. 1 (1878); Lawrence v. Fletcher, L. R. 12 Ch. D. 858 (1879).

<sup>75</sup> Maanss v. Henderson, 1 East, 335, 102 Rep. 130 (1801); Foster v. Hoyt, 2 Johns. 327 (N. Y. 1801).

or particular, avail himself of that lien by way of substitution. In other words, his general lien, as against the principal, is limited to the amount due from the principal to the agent.<sup>76</sup> Thus, if an agent employs an insurance broker to effect a policy, although the broker is aware that the agent is acting for a principal, he has a particular lien for premiums paid by him, or for which he is liable, and this notwithstanding that the principal settles with the agent;<sup>77</sup> but, in the absence of a lien in favor of the agent to which he may be substituted, he has no lien as against the principal for a general balance due from the agent in other transactions.<sup>78</sup> On the other hand, if the subagent has not notice that his immediate employer is not acting on his own behalf, he has the same right of lien, general or particular, as against the principal, that he would have had against the agent had the agent been acting on his own behalf.<sup>79</sup> Thus, in the illustration above given, if the insurance broker were not aware that he was dealing with an agent, he would have, upon the policy, not only a particular lien, but a lien for any general balance due him as broker from the agent. Having reason to believe that his employer was the principal, he is entitled to hold the policy.<sup>80</sup>

<sup>76</sup> *Man v. Shiffner*, 2 East, 523, 102 Rep. 469 (1802); *Ex parte Edwards*, L. R. 8 Q. B. D. 262 (1881).

<sup>77</sup> *Fisher v. Smith*, L. R. 4 App. Cas. 1 (1878).

<sup>78</sup> Cases cited in footnote 75, p. 445, *supra*.

<sup>79</sup> *MONTAGU v. FORWOOD*, [1893] 2 Q. B. 350, Powell, Cas. Agency, 402.

<sup>80</sup> *Westood v. Bell*, 4 Camp. 349 (1815).

## APPENDIX

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### NEW YORK FACTORS' ACT

Lien Law, § 182 (Laws 1909, ch. 38)

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§ 182. Factor's lien on merchandise. A person, in whose name any merchandise shall be shipped, is deemed the true owner thereof so far as to entitle the consignee of such merchandise to a lien thereon:

1. For any money advanced or negotiable security given by such consignee, to or for the use of the person in whose name such shipment is made; and

2. For any money or negotiable security received by the person in whose name such shipment is made, to or for the use of such consignee.

Such lien does not exist where the consignee has notice, by the bill of lading or otherwise, when or before money is advanced or security is given by him, or when or before such money or security is received by the person in whose name the shipment is made, that such person is not the actual and bona fide owner thereof.

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Personal Property Law, § 43 (Laws 1909, ch. 45)

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§ 43. Factors' act. 1. Every factor or other agent, intrusted with the possession of any bill of lading, custom-house

permit, or warehouseman's receipt for the delivery of any merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise and any account receivable or other chose in action created by sale or other disposition of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof.

2. Every person who shall hereafter accept or take any such merchandise and any account receivable or other chose in action created by sale or other disposition of such merchandise in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby, or enforce any right or interest in or to such merchandise and any account receivable or other chose in action created by sale or other disposition of such merchandise or document, other than was possessed or might have been enforced by such agent at the time of such deposit.

3. Nothing contained in the preceding subdivisions of this section shall be construed to prevent the true owner of any merchandise and any account receivable or other chose in action created by sale or other disposition of such merchandise so deposited, from demanding or receiving the same, upon prepayment of the money advanced, or on restoration of the security given, on the deposit of such merchandise and any account receivable or other chose in action created by sale or other disposition of such merchandise, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same; nor from recovering any balance which may remain in the hands of the person with whom such merchandise and any account receivable or other chose in action created by sale

or other disposition of such merchandise shall have been deposited, as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit.

4. Nothing contained in this section shall authorize a common carrier, warehouseman, or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same.

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